



ADReport



Alternative Dispute Resolution Section

Marc Baer, *Chair*
Thomas J. Dolina, *Editor*

Maryland State Bar Association, Inc.

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Message from the Chair

As my first order of business as Chair, I would like to welcome our new Section Council members, Claudia Conroy, David Simison, Andrea Terry, and Judge Alexander Wright, and welcome back the returning Section Council members, Tom Dolina-Vice Chair, Richard Melnick-Secretary, Craig Distelhorst-Financial Manager, Richard Alper, Alan Carmel, Judge Paul Dorf, Craig Little, and Steven Shapiro.

I would also like to thank Joyce Mitchell for her leadership, friendship, and vision, which I will certainly attempt to emulate. Joyce has set the bar high, but I am confident our Section can continue to strive ahead. Also, I would like to thank Jonathan Rosenthal for his leadership and for all of his time, energy, ideas, and most importantly his sense of humor. Although Jonathan is now an ex-officio member of the Council, I hope he will continue to be active with the Section Council— especially in light of his challenge to remake the MSBA Annual Meeting into the MSBA-ADR Section Annual Meeting.

The past MSBA Annual Meeting had much to offer for those interested in ADR. There were 5 separate ADR related programs, 4 of which were sponsored by our Section. These programs were well received by those in attendance. Thanks to those who served on the Committee and to those who presented the workshops.

While our Section Council year is just starting, the Section Council is actively at work. Some of the current projects include:

1. The Business ADR Program, which will take place in the fall of 2007. The program is a joint effort with other MSBA sections. The Business ADR Program Committee has lined up two prominent keynote speakers-Kathy Bryan, the President of the International Institute of Conflict Prevention and Resolution, and Senator George Mitchell. This should prove to be a very worthwhile program, and will

appeal to a both attorneys and clients who are looking for ways to resolve conflict. Please mark your calendars, as we are expecting a large turnout. If you are interested in working on a committee, or would like additional information, please contact Richard Melnick at richard.melnick@montgomerycountymd.gov.

2. The ADR Section is co-sponsoring an “Art of Mediation” Show, which will take place at the Columbia Art Center. If you have any questions about this program, contact Joyce Mitchell at Jamitchesq@aol.com.

3. The ADR Section was one of the sponsors of the Maryland Mediators Convention.

As many of you are aware, the Court of Appeals will be presented with a proposed change to Rule 2.1 of the Maryland Rules of Professional Conduct. The present rule imposes a discretionary obligation to advise clients of alternatives to litigation. It is my understanding that the proposed rule seeks to change the current discretionary requirement from a “may” to a “should” standard. Others have sought to change the discretionary language to a mandatory “shall” standard. The language of the proposed change has not yet been finalized. Once finalized, the rule change will be presented to the Court of Appeals, where it will be open for public comment. The ADR Section Council is currently reviewing this matter, as I believe it is important for our Section to weigh in on the proposal.

I would also like to let you know of the ADR listserv. This is a great way to send out announcements, inquire, seek feedback and otherwise communicate with other Section Members. The link to the listserv is MSBAadr@lists.msba.org The listserv is a great resource

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Letter from Master Funari

Effective July of 2005, comment 5 of the Maryland Rules of Professional Responsibility 2.1 was modified to create the duty that "when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternative to litigation." I welcome the recent revision. Yet, does the change go far enough when attorneys advise clients to the availability of alternatives to litigation?

Because I do not believe it does, I sought a revision to comment 5.⁷ There is tremendous value to settle cases as early as possible when representing a client. However the use of ADR is underutilized. For example based on a study of domestic cases for the second half of 1998, only 125 cases were mediated out of a total of 1,687 divorce cases reviewed. (6.8 percent)⁷ Settling cases in the early stage of representation saves countless hours, cost and avoids clients from becoming entrenched to inflexible positions. Lastly relationships may be preserved and valuable court resources may be freed up.

Creating a stronger obligation for attorneys to advise their clients of alternatives to litigation enables the client from the beginning of the representation to choose how to pursue his/her case. However as currently drafted, in my view Rule 2.1 does not guarantee such choice. In those states

that have adopted a less discretionary obligation, the response from clients and the legal community has been very positive. 'With this positive feedback, it is my hope that the Maryland Court of Appeals will embrace a more obligatory duty and make ADR an immediate resource for attorneys to consider when advising their clients.

Master Theresa Funari

As a result of a presentation on September 8, 2006, the Rules Committee proposed revisions to Rule 2.1. In the very near future, said revisions will be published and subject to public comment, before a hearing before the Court of Appeals. Said hearing has not been scheduled.

Custody and Financial Distribution in Maryland, an Empirical Study of Custody and Divorce Cases filed in Maryland During Fiscal Year 1999, The Women's Law Center of Maryland Inc., 2004

The states of Alaska, Colorado, Hawaii, Massachusetts, Tennessee, Vermont and Virginia currently have language in their rules that create either a mandatory duty of shall or advisory duty of should when advising clients of the use of ADR.

From the Chair...

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which has been underused. One of my goals is to seek active participation from the Section members, and the listserv is a way for the members to participate.

On the subject of communications, the Section traditionally publishes 3 newsletters each year. If anyone wants to submit an article or has any ideas for future newsletters, please let me know.

Our Section currently has 413 members. Not only would I like to see the membership grow, but provide more member services. Please let me, or any other Section Council member, know what we can do to help your practice and how you can participate in the Section's activities.

Nominations to the Section Council

Those interested or those who wish to nominate members to the Section Council should submit letters of interest or nominations, along with resumes, to Thomas J. Dolina, via email at TJDolina@aol.com. Thank you and best wishes.

- Thomas J. Dolina



Status of the Business ADR Program

The purpose of the Business ADR Program is to educate and encourage businesses and their attorneys regarding the use of alternative dispute resolution (ADR) methods, in addition to litigation, in resolving disputes.

Some typical examples of parties with whom businesses may have conflict include customers and clients (including consumers and other businesses), as well as employees. The Business ADR Program seeks to enable businesses to develop and enhance dispute resolution systems and ADR awareness. The Business ADR Committee of the MSBA's ADR Section is working with MICPEL, CPR, and other organizations to plan and prepare the Business ADR Program, which is scheduled for the Fall of 2007. Our keynote speakers are (Afternoon) Kathy Bryan, former counsel to Motorola and presently the President of the International Conflict Prevention and Resolution Institute, and (Dinner), tentatively, Senator George Mitchell as designated keynote speaker

We hope to create a memorable, synergistic event that will help businesses and their attorneys move forward into the future with efficient and cutting edge systems and solutions to resolve conflicts in business settings. Ideally, the event will cross-over many substantive legal areas and disciplines.

Several subcommittees are presently working to organize the event. Please contact the Subcommittee Chair or Co-chairs with which you would like to work, from the list below:

Logistics Subcommittee
(venue, food and beverage, scheduling, budget)

Co-Chairs- Lucy Robins
LucyBRobinspaol.com
David Simison
das@daslaw.com

Promotions/Sponsorship Subcommittee
(advertising, obtaining co-sponsors, outreach to attorneys, businesses, and others)

Co-Chairs- Alexander Wright
awright@milestockbridg.com

Program Subcommittee
(speakers/presenters, topic selection, coordination of presentations)

Co-Chairs- Joyce Mitchell
jamitchesq@aol.com
Doug Bregman
dbregman@bregmanlaw.com

We look forward to working with you. Thank you.

All the best, *Richard Melnick*

TIPS FOR EFFECTIVE ADVOCACY IN MEDIATION OF EMPLOYMENT DISPUTES

By Pamela J. White and Craig Distelhorst

Mediation is a process in which a neutral third party facilitates and coordinates the negotiation of an existing dispute. It is a consensual process that takes a non-adversarial approach to conflict resolution. The parties are encouraged to communicate directly about their dispute, and the mediator merely facilitates communications between the parties, to assist them in focusing on the real issues of the dispute. Mediation is attractive to resolve workplace disputes especially involving emotionally charged issues, affording an employee a chance to be heard, and allowing unconventional remedies such as an apology. The mediator may suggest ways of resolving the dispute but may not impose a settlement on the parties. The parties themselves arrive at a mutually acceptable resolution of the dispute.

As a purely consensual process, mediation does not bind the parties unless the parties specifically agree. Accordingly, agreements to mediate may include language to the effect that employers intend to be bound by any settlement reached as the final resolution of their dispute. Mediation agreements should include a confidentiality provision to minimize the risks of improper use of information developed in mediation.

Representative or typical terms of an agreement to mediate follow:

Employee and XYZ Corporation, for themselves and by counsel, have agreed voluntarily to mediate a certain dispute between them and have engaged the services of the under-

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CHIEF JUDGE ROBERT M. BELL AWARD FOR OUTSTANDING CONTRIBUTION TO ALTERNATIVE DISPUTE RESOLUTION IN MARYLAND

PURPOSE

The Chief Judge Robert M. Bell Award for Outstanding Contribution to Alternative Dispute Resolution in Maryland is to honor the vision and accomplishments of Chief Judge Robert M. Bell for his Herculean work in promoting the use of alternative dispute resolution programs and activities in the Maryland judiciary, schools, government and communities by:

- ♦ Recognizing Maryland organizations and individuals, both within the legal community and beyond, that are creating and providing innovative and effective ADR services and programs;
- ♦ Supporting entities which seek excellence through educational programs, outreach programs and which demonstrate a commitment to utilize ethical standards in their ADR programs and practices; and
- ♦ Encouraging individuals to become catalysts for change and to demonstrate exemplary ADR best practices and approaches.

PROCEDURE

The Award is open to any individual, agency, business or entity to submit nominations. The due date for nominations is April, 2007. A letter which documents how the candidate or organization meets the three objectives of the award is required. A bio or corporate profile must also be provided. The nominating individual and or organization should identify itself and address the relationship of the nominee to the proposer. The Section Council's Spring Dinner Committee will consider the nominations, select the awardee(s) and report to the Section Council for acceptance of the choices.

Nominations should be sent in three copies, and post marked by April, 2007 to:

Joyce Ann Mitchell, Esq.
Joyce Ann Mitchell & Associates, P.C.
8601 Georgia Avenue, Suite 601
Silver Spring, MD 20910

Advocacy in ADR – The Zealous Lawyer

By David Simison

Alternative Dispute Resolution is changing the definition of effective representation. Zealous advocacy of our clients' interests may serve them well in the courtroom, but may actually interfere with obtaining a favorable result in ADR. It is said that the best attorneys keep their clients out of the courtroom. Whether that is true or not, an attorney who knows the growing and continually refining field of ADR is in the best position to advise clients appropriately and effectively, if not "zealously."

Generally, ADR can be viewed as any resolution process that occurs outside the courtroom. Arbitration is probably the oldest form of ADR, or at least the form with which most attorneys are familiar. In Arbitration, facts are submitted to an Arbitrator to make a decision that is either binding or non-binding. The advantage of Arbitration is the speed and

informality of the process. Because the arbitrator is a fact-finder, the attorney's role in presenting the facts is crucial. Zealous advocacy has a role in arbitration. Whose facts are accepted can control the outcome — hence the need for a voice, "advocacy."

The attorney's role in mediation, however, is less clear. Even as we speak, the field of mediation is undergoing changes and refinement. Many attorneys fail to appreciate or understand the differences between mediation and arbitration. To confound matters, many "mediators" approach their mediation in much the same way as an arbitrator does, their mediation merely becomes a kinder gentler arbitration. However, understanding the differences between arbitration and me-

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Advocacy in ADR...

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diation is crucial to understanding the role of successful legal counsel in the context of mediation.

These days there is general agreement in the mediation community that mediation takes one of three forms, although the lines between them does tend to blur at times. Evaluative mediation is the mediation previously referred to as a “kindler and gentler” form of arbitration. The mediator often hears from each side without formal presentation of “evidence” and then helps the parties achieve a result they find acceptable. In evaluative mediation it is not uncommon for the mediator to assess the facts and based upon the mediator’s experience suggest results that approximate the mediator’s guess of a trial outcome. In evaluative mediation the mediator’s “experience” in the field being mediated is used to offer the parties the mediator’s judgment of probable outcome. In evaluative mediation, legal counsel’s participation is important to assure that the mediator has all of the facts before the mediator offers a view of the outcome. In evaluative mediation, there is a role for advocacy even if the toned-down process makes zealous action seem inappropriate.

A second common form of mediation is facilitative mediation. It is said in facilitative mediations the parties “own” the mediation. In facilitative mediation, the solution the parties achieve with the help and guidance of the mediator is the goal — irrespective of the possible or even probable judicial outcome. In facilitative mediation, the mediator guides the conversation of the parties helping to tone down argument and adjust focus on identifying the underlying issues in the dispute to achieve a “win-win.” In facilitative mediation it is recognized that often there is more involved than money. Facilitative mediation aims for a result the parties create — a result that meets their respective interests and needs. Many times interests and needs are non-monetary. Although ignorance is bliss, parties going into facilitative mediation are well-served by their legal counsel when the parties are fully briefed on their legal rights and responsibilities. In facilitative mediation there really is no place for “zealous advocacy,” since the goal is to foster communication and understanding rather than to achieve a monetary outcome. It is inappropriate for a facilitative mediator to

lead the parties into a binding agreement without participation of legal counsel or to suggest outcomes. However, and because of that, legal counsel can relax and need not participate or appear at a facilitative mediation, knowing that any agreement reached by the party is tentative and non-binding until reviewed by legal counsel. The attorney should confirm with the mediator in advance that the mediator will not present the parties with a binding document without benefit of legal counsel. Once the appropriate assurances are provided, the attorney can leave the mediation in the hands of the client, trusting the client will achieve an agreement that meets the client’s needs and interests.

The third common form of mediation is known as transformative mediation. The goal in transformative mediation is to transform the oppositional outlook of the parties. Transformative mediation will often focus on underlying emotions more than facilitative and evaluative mediation. In transformative mediation, the hope and expectation is that the parties will acknowledge the other person, their needs, interests and values and the relationship will transform from one of conflict to one of mutual recognition — the financial outcome becomes irrelevant because the relationship is being cured. Transformative mediations that do not result in a “settlement” can still be seen as successful, if the parties have attained a mutual understanding and respect. In transformative mediation, the role of legal counsel is much the same as in facilitative mediation — the attorney need do nothing more than assure that before the mediation, the client is well versed in their legal rights and responsibilities. The attorney is free to attend the needs of other clients while mediation occurs.

In sum, zealous advocacy has a role only when the outcome is a function of the underlying “facts.” Accordingly, zealous advocacy has a role in arbitration and a lesser role in evaluative mediation. However, when facilitative or transformative mediation is involved, legal counsel is most effective when they provide their client a good briefing of rights and responsibilities in advance of the mediation and then get out of the way thereafter. In the end, it is always legal counsel’s responsibility to learn which type of mediation is being conducted and then to act accordingly.



Congratulations!!!

Congratulations to our Section member Pamela J. White for her appointment to the bench for the Circuit Court of Baltimore City.



ADR Announcement

Good morning and Happy New Year to all and your families.

The Rules Committee has submitted its Report of Proposed Rule Changes. Below is the Notice of the Proposed Rules Changes along with the specific proposal as to Comment 5 to Rule 2.1 of the Maryland Lawyers' Rules of Professional Conduct. Please further note that written comments to the proposed rule change must be submitted before February 19, 2007.

The ADR Section Council will continue to discuss the proposed ADR change and the impact on our members' practice. The Council expects to file written comments as well as appear before the Court of Appeals in further support of our interests.

We will keep the Section advised of any developments, and should you have any questions or comments, please feel free to contact me or any other member of the Section Council.

STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE NOTICE OF PROPOSED RULES CHANGES

The Rules Committee has submitted its One Hundred Fifty-Seventh Report to the Court of Appeals, transmitting thereby proposed new Rules 9-205.1 (Appointment of Child's Counsel) and 16-804.1 (Judicial Inquiry Board); new Forms 9-102.1, 9-102.2, 9-102.3, 9-102.4, 9-102.5, 9-102.6, 9-102.7, 9-102.8, 9-102.9, and 9-102.10; and new Appendix: Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access and proposed amendments to Rules 1-101, 1-104, 1-202, 2-126, 2-201, 2-341, 2-504, 2-532, 2-533, 2-534, 2-535, 2-641, 2-644, 2-645, 2-652, 3-126, 3-201, 3-641, 3-644, 4-214, 4-217, 4-261, 4-342, 4-343, 4-345, 4-347, 4-642, 5-615, 7-112, 8-423, 8-605.1, 9-101, 9-102, 9-103, 9-104, 9-105, 9-106, 9-107, 9-108, 9-109, 9-110, 9-111, 9-112, 9-113, 9-203, 14-206, 16-109, 16-803, 16-804, 16-805, 16-806, 16-808, 16-811, 16-819 (d), 16-819 (e), 16-903, 16-1002, and 16-1006; Appendix: Maryland Code of Conduct for Court Interpreters; and Appendix: Maryland Lawyers' Rules of Professional Conduct, Preamble and Scope and the Comments to Rules 1.7, 1.14, and 2.1.

The Committee's One Hundred Fifty-Seventh Report and the proposed new rules, new forms, and amendments are set forth below.

Interested persons are asked to consider the Committee's Report and proposed rules changes and to forward on or

before February 19, 2007 any written comments they may wish to make to:

Sandra F. Haines, Esq.
Reporter, Rules Committee
2011-D Commerce Park Drive
Annapolis, Maryland 21401

Alexander L. Cummings, Clerk
Court of Appeals of Maryland

MARYLAND RULES OF PROCEDURE APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT COUNSELOR

AMEND Comment 5 to Rule 2.1 of the Maryland Lawyers' Rules of Professional Conduct by deleting language from the third sentence and by adding language concerning advising the client about one or more forms of alternative dispute resolution, as follows:

Rule 2.1. ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT

Offering Advice. - [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation and in the opinion of the lawyer, one or more forms of alternative dispute resolution are reasonable alternatives to litigation, the lawyer should advise the client about those reasonable alternatives. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

REPORTER'S NOTE

The proposed amendment to Comment 5 to Rule 2.1 deletes from the third sentence, "it may be necessary under Rule 1.4
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Announcement...

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to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation,” and replaces it with a specific reference to “one or more forms of alternative dispute resolution” (“ADR”) as reasonable alternatives

to litigation about which a lawyer should advise his or her client. The amended Comment is intended to encourage informed discourse between the lawyer and client whenever ADR may be an appropriate option.

Tips...

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signed mediator who will attempt to help them reach a satisfactory resolution of their dispute. All parties and counsel will appear at their mediation conference with full authority to mediate and settle their dispute. The mediation process will be guided by reference, where appropriate, to the Employment Mediation Rules of the National Rules for Resolution of Employment Disputes (www.adr.org).

Mediation sessions are private, and confidential information disclosed between the parties and the mediator shall not be divulged by the parties or the mediator. Thus, the parties shall maintain the confidentiality of: views expressed or suggestions made by another party with respect to possible settlement of the dispute; admissions made by another party; proposals made or views expressed by the mediator; or any party’s acceptance or rejection of any proposal for settlement made by the mediator.

Accordingly, the parties and attorneys whose signatures appear below agree that all proceedings in mediation and for the purpose of mediation, including any position statement made and document prepared by any party, attorney, or other representative for this mediation, are privileged and confidential and shall not be disclosed in any subsequent proceeding or document, nor construed for any subsequent purpose as admission(s). Any completed, recorded or written settlement agreement that may result from mediation shall not be confidential within the meaning of this agreement.

Attorneys are obliged to tell their clients about alternative means to resolve their employment disputes rather than in litigation. See Md. Rules of Professional Conduct 1.4 (b), 2.1 (“when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation,” Comment to 2.1). Counsel’s discussion about mediation with a client must include close attention to the client’s interests and objectives which may be achievable in mediation. Client discussions reasonably should include attention to:

- ♦ Description of process and definition of mediation; attention to facilitative and evaluative distinctions

- ♦ Timing of mediation
- ♦ Procedures for selecting mediators
- ♦ Qualifications, experience and neutrality of mediators
- ♦ Participants in mediation
- ♦ Whether litigation goals can be achieved in mediation, risks of success and failure
- ♦ Monetary and non-monetary costs and compare costs of preparation for litigation and mediation
- ♦ Considerations of privacy and confidentiality of mediation
- ♦ Considerations of client credibility, ability to communicate effectively
- ♦ Evaluation, quantification of damages before mediation conference

Most mediators (and settlement judges) will require submission of position statements in advance of the mediation conference. Typical instructions by mediators (or federal magistrate judges) will include the following in a case otherwise heading toward trial:

Each party must provide me candid position statements at least one week before the conference, including:

1. Facts you believe you can prove at trial;
2. The major weaknesses in each side’s case, both factual and legal;
3. An evaluation of the maximum and minimum damage awards you believe likely;
4. The history of any settlement negotiations to date;
5. Estimate of attorneys’ fees and costs of litigation through trial

The letters may be submitted *ex parte* and will be solely for my use in preparing for the settlement conference. If you want me to review any case authorities that you believe are critical to your evaluation of the case, please identify. If you want me to review any exhibits or deposition excerpts, please attach copies to your letter. In preparation for the conference, Claimant should submit a written demand to the Respondent in time for Respondent to submit a written offer to the Claimant prior to the conference.

Tips...

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The settlement conference process will be confidential and disclosure of confidential dispute resolution communications is prohibited. Counsel for the parties may call me, *ex parte*, with any questions.

At the time of the conference, counsel must communicate adequately with the client so as to inform each other of the pragmatic interests of the client in a negotiated settlement, as well as the factual and legal positions of the client. Counsel should be an effective listener and should not be limited to legal considerations to devise a mediation strategy. Counsel and the client should understand the strengths and weaknesses of each side, as well as the intention of each side to secure a “victory” or optimal terms of any settlement. Counsel must have performed a risk analysis and evaluated that assessment with the client.

In preparation for the mediation conference, counsel should plan to:

- ♦ Commit to and benefit from Confidentiality
- ♦ Know the Rules of Procedure
- ♦ Ask the Mediator (if you don’t know)
- ♦ Have a Strategy
- ♦ Bring a Decision Maker
- ♦ Have a flexible plan
- ♦ Listen to the Opponent and communicate with your client
- ♦ Know how to Negotiate and Negotiate with Opponents (not the Mediator)
- ♦ Communicate with and use the Mediator to facilitate negotiations
- ♦ Be an advocate of your client’s best interests – not your clients’ legal position

Impediments to Effective Mediation include:

- ♦ Lawyers who don’t know their clients’ case or their clients’ interests
- ♦ Lawyers who don’t undertake risk assessment
- ♦ Lawyers who don’t appreciate the other side’s case
- ♦ Lawyers who don’t know how to negotiate
- ♦ Lawyers who are uncivil, offensive, demeaning or threatening
- ♦ Lawyers who fear collaborative negotiation
- ♦ Lawyers who don’t trust the confidentiality process of mediation
- ♦ Lawyers who hold back important information in mediation
- ♦ Lawyers who don’t provide credible numbers or terms during negotiations
- ♦ Lawyers who don’t listen to their clients or their opponents to understand their positions

- ♦ Lawyers who don’t address the impact of loss on their opponents
- ♦ Lawyers who use their clients as a foil to obstruct negotiation
- ♦ Lawyers who require victory and fear the perception of losing
- ♦ Lawyers who compete with Mediator for their client’s trust
- ♦ Lawyers who take backward and/or reactive steps in negotiations
- ♦ Lawyers who neglect to learn how insurance affects claims
- ♦ Lawyers who neglect tax implications of settlement payments

A successful mediation will result in an effective written agreement. Counsel ought to consider and be prepared to craft a settlement agreement with the following elements and considerations:

- ♦ Recitals, purposes of Agreement, interests of the parties
- ♦ Existence of Employment Contract (especially Restrictive Covenants and Severance Terms)
- ♦ Transitional Cooperation, return of Employer’s property
- ♦ Resignation, separation of convenience or other termination
- ♦ Payment of all earned compensation
- ♦ Neutral or other references and Job Placement Assistance
- ♦ Agreed public statements, commitments to non-disparagement
- ♦ Separation Pay
- ♦ Termination of Fringe Benefits; COBRA
- ♦ Disclaimer of Liability
- ♦ General Release or Limited Release
- ♦ Covenant Not to Sue or Waiver of Right of Recovery
- ♦ Indemnification of officers; cooperation in litigation
- ♦ Timely Notice of Subpoenas, agency demands for information
- ♦ Commitment to ethics code; all compliance matters disclosed
- ♦ Confidentiality of settlement terms, limited exceptions; rumor control
- ♦ Confidentiality of proprietary information, protection of trade secrets
- ♦ Non-Solicitation, non-competition provisions
- ♦ Tax Forms 1099 or W-2
- ♦ Mandatory income tax withholdings, FICA
- ♦ Attorneys’ Fees
- ♦ OWBPA provisions (Older Workers Benefit Protection Act)
- ♦ Applicable law; severability; written modifications