Law Offices of
A. PETER RAUSCH, JR.
ATTORNEYS AND COUNSELORS AT LAW

Mediation Basics

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I. Introduction.

When many of us started practicing law "mediation" was relatively unknown, little used and avoided like the plague. Mediation was synonymous with "settlement" and "settlement" translated into "weakness". Litigators are not weak. We fight and we win. Therefore, litigators do not settle.

A mentor once told me, trying to impart a warrior mentality, that settlements were easy. "You can settle any case, indeed, every case," he said, "All you have to do is give the other side everything it wants."

Well gone are the days of the warrior mentality. Litigation today is all about full disclosure, cooperation, joint statements, professionalism and civility. Gone are the days of winning trials by ambush, of burying the smoking gun document at the bottom of a box, at the back of a truck, hidden on the side of a warehouse. Settlement opportunities use to elude us until the eve of trial when the "settlement conference" became the last opportunity to resolve a case on the courthouse steps. Today, mediation pervades litigation strategy and must be integrated into the litigation plan, literally at the outset of the new case intake.

In the present day American court system only three percent (3%) of civil cases ever actually get to trial.[1] Even less see a jury. The large majority of cases resolve. Given that destiny for the vast majority of civil disputes and acknowledging that resolution typically involves compromise, success is best achieved by mediating earlier than later and by avoiding the costs, both financial and emotional, and the delay that the path to trial would otherwise take.

II. Mediation Basics.

Mediation is a voluntary method of alternative dispute resolution. The process is protected by a thick shell of confidentiality. The process is usually cooperative and conciliatory. It is not judgmental. It excludes coercion and it

[1] Bureau of Justice Statistics Bulletin, "Civil Trial Cases and Verdicts in Large Counties, 2001 (April 2004). http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc01.pdf

involves neutral facilitation of discussions that lead the parties to a consensual resolution that they own - the outcome is crafted by them, not handed to them. Unlike trial, which focuses on conflict and polarizes the parties' respective and competing positions with adversarial advocacy, mediation encourages the parties to understand their opponent's point of view. Once their opponent's view is understood, the parties can work toward identifying and achieving a common goal of early affordable dispute resolution. Mediation works because in avoiding the polarization that results from adversarial advocacy, parties achieve clarification of their position, eliminate misunderstanding and overcome their anger and hostility by focusing on the common goal of voluntary mutually agreeable resolution.

III. Mediation Success.

In order for the mediation process to succeed, parties must be **empowered** and **recognized**.

Empowerment means that the parties are invested with their own decision making authority. Empowerment begins with the simple agreement to enter into the mediation process. It unfolds as the parties participate in the mediation process as revealed by the mediator in session. Parties are empowered because they are able to decide whether to continue in the process or terminate the session. They are empowered because they alone, decide what outcome is achieved collectively and collaboratively through the process. Empowerment allows parties to focus and clarify their own positions and contentions in the dispute. Empowerment allows parties to communicate with their adversaries in a way that is otherwise unavailable. Empowerment allows the parties to understand their opponent's point of view without agreeing with or accepting that view - which removes a common impediment to any resolution. Empowerment leads to recognition.

Recognition occurs when the client understands that the other side understands and appreciates (while not agreeing with or accepting) the client's point of view. Recognition does not mean we accept and agree with the opposing point of view, it just means we understand. Once parties understand each other, and more specifically, once they understand that the other side understand's their position, both are free, often for the first time in the case, to begin discussing how differences can be worked out.

IV. The Role of the Mediator.

It is often striking how frequently parties in mediation view and treat the mediator as the most powerful person in the room. In truth, really, the mediator is the most powerless person in the process. But it is in such powerlessness that the mediator can achieve success by facilitating a collaborative discussion using confidentiality and impartiality as the tools for success.

The mediator's primary role and primary goal is to vest each side with empowerment and recognition so that the parties can be poised to succeed. When the mediator is able to firmly establish the empowerment of each side and allow them to experience recognition of their point of view from their opponent, then the hard work is over and all that is left is to work out the details of the compromise.

Although the mediator is not responsible for achieving a particular outcome, she must be responsible for the mediation process. Thus, while the mediator is neutral as to the ultimate factual and legal points in dispute, she is not

neutral about the process of the mediation session and must actively work hard to ensure that the parties choose to continue voluntarily participate and work toward their own mutually acceptable outcome.

In order for the mediator to be effective, she must have a complete command and understanding of the specifics involved in the dispute and of each parties' position and perspective in the controversy. A skilled mediator is less interested in understanding and acknowledging what a party demands and contends but rather is more interested in focusing on the underlying interests, concerns and causes that precipitate and lie behind those demands and those contentions. For mediation to succeed, counsel must furnish the mediator with the information and insights that he needs to mediate effectively. By actively listening, inquisitively examining and facilitating discussion, both privately and collectively, a mediator can discover, and help the parties discover, what root issues really need resolution to achieve settlement of the dispute.

V. Confidentiality.

The mediation process is cloaked in a thick shell of confidentiality. Confidentiality is not only essential to effective mediation, it is typically required by statute.[2] "The mediation confidentiality provisions of the Evidence Code were enacted to encourage mediation by permitting the parties to frankly exchange views, without fear that disclosures might be used against them in later proceedings."[3]

Mediation confidentiality is codified in California Evidence Code section 1115 *et seq.* Evidence Code section 1119 specifically provides that,

> "no evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled in any arbitration, administrative adjudication, civil action or other non-criminal proceeding in which, pursuant to law, testimony can be compelled to be given."

Section 1119(b) provides the same protection for writings. The statute closes out by mandating in subsection (c) that, "all communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."[4]

The mediation confidentiality provisions as codified by the Evidence Code are not limited to only restricting the admissibility of communications made "in the course of mediation". Rather, the section provides an expansive view of the scope of protection by

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[2] *Foxgate Homeowners Association v. Bramalea California, Inc.*, (2001) 26 Cal.4th 1.

[3] *Fair v. Bakhtiari*, (2006) 40 Cal.4th 189, 194.

[4] Section 1115(c) defines "mediation consultation" as any communication between a person and a mediator for the purpose of initiating, considering or reconvening a mediation or retaining the mediator.

encompassing all written and oral communications made not only during the course of the mediation but also "for the purpose of" and "pursuant to" a mediation or mediation consultation. The contours of what is and is not protected by mediation confidentiality were flushed out in a significant and recent opinion by the California Court of Appeal in *Wimsatt v. Superior Court*, decided by the Court of Appeal, 2nd Appellate District, Division 3 in June 2007.[5]

***Wimsatt v. Superior Court* explored.**

Wimsatt involved a legal malpractice case relating to legal representation in an underlying personal injury case. The claims involved alleged breach of fiduciary duty by the submission of an unauthorized settlement demand to the opposing party. The petitioner learned about the allegedly unauthorized offer from a "confidential mediation brief" submitted to the mediator in the underlying personal injury suit. On the morning before the mediation one of the plaintiff's co-counsel sent an email to the defense attorney who submitted the brief asking for clarification about the settlement demand amount. The defense counsel responded that the information was discussed in one of the telephone calls between defense counsel and plaintiff's other co-counsel. Plaintiff's attorney also emailed his co-counsel inquiring about the statement made in the defendant's mediation brief inquiring whether any such settlement demand had been made. Co-counsel responded that in discussions with defense counsel about a month prior to the mediation he had discussed a reevaluation of damages and expressed that he thought a reduced plaintiff's demand was in order, but also had clarified that he had no authority to make a reduced demand. The case resolved at mediation and the malpractice case ensued, on allegations that plaintiff's attorney breached a fiduciary duty by reducing plaintiff's settlement demand without plaintiff's knowledge or consent.

In reviewing the mediation confidentiality protections as applied to the mediation briefs, the emails and the reduced settlement demand discussions, the Court provided a thorough outline and review of California's leading cases on the mediation confidentiality privilege. The Court held that the mediation briefs were protected.

> "Mediation briefs are designed to facilitate an open and frank dialogue with the hope that the case can be resolved in the mediation. When written, the authors expect the briefs will always be kept confidential and used only in mediation by the mediator and the parties. Thus, mediation briefs are an integral part of the mediation process and are prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, and are to remain confidential."[6]

The Court also found that the emails written the day before the mediation were protected from disclosure. The Court noted the emails quoted from, and referenced, the confidential mediation brief and they were materially related to the mediation that was to be held the next day. Thus, the emails were protected and not subject to discovery. "The emails were made for the purpose of, in the

[5] (2007) 152 Cal.App.4th 137.

[6] *Wimsatt*, at 38.

course of, or pursuant to, a mediation or a mediation consultation and are not subject to disclosure."[7]

However, the Court of Appeal also found that the contents of the conversation by which the plaintiff's attorney had purportedly lowered the plaintiff's settlement demand, were not protected by the mediation confidentiality.

> "Mediation confidentiality is to be applied where the writing or statement would not have existed but for a mediation communication, negotiation, or settlement discussion. ...[The attorney communicating the allegedly lowered settlement demand had] not brought forth any evidence to demonstrate that the conversation [was] linked to ... mediation or that it [was] anything other than expected negotiation posturing that occurs in most civil litigation."

> "All conversations between the parties are not protected by mediation confidentiality simply because the conversations might have occurred temporally before a scheduled mediation. ... [The proponent of confidentiality] has not shown that the purported conversation was made for the purpose of, or pursuant to, the mediation. ... This evidence suggest[ed] that the conversation occurred during a 'discovery' conversation. Thus, the conversation may have occurred, and the statement could have been made, even if there was to be no mediation. If so, the statements were communications, negotiations, and settlements made in the regular course of the litigation, not for the purpose of, in the course of, or pursuant to a mediation."[8]

The effect of the Court's ruling was that the malpractice case could not go forward with any reference to the mediation brief or the emails. The Court was troubled by this result.

> "The stringent result we reach here means that when clients, ... participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel. Certainly clients, who have a fiduciary relationship with their lawyers, do not understand that this result is a by-product of an agreement to mediate. We believe that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and the

[7] *Wimsatt*, at 38.

[8] *Wimsatt* at 43-44.

> administration of justice is not served."[9]

Thus the Court concluded, "given the number of cases in which the fair and equitable administration of justice has been thwarted, perhaps it is time for the legislature to reconsider California's broad and expansive mediation confidentiality statutes and to craft ones that would permit countervailing public policies be considered."[10]

Mediation confidentiality, while imperative to the success of the process, may be seen as overly broad and far reaching and properly subject to public policy adjustment by future legislation in the wake of the *Wimsatt* case.

VI. Enforcing Mediation Settlements.

The mediation confidentiality rules also play into and affect the manner in which mediation settlements can be enforced. Typically successful mediations result in a written settlement agreement. This agreement may be more or less complete and more or less final at the end of the mediation session depending on the documentation approach of the participating lawyers and the mediator. But such agreements must stand on their own because resort can not be had to the pre-agreement discussions, which are protected by mediation confidentiality.

Mediation settlement agreements are enforceable under California Code of Civil Procedure section 664.6. Section 664.6 provides that,

> "if parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the Court or orally before the Court, for settlement of the case, or part thereof, the Court, upon motion, may enforce judgment pursuant to the terms of the settlement."

In short, section 664.6 permits a trial court to enter judgment in accordance with the terms of a written settlement agreement by summary procedure and without the need for a new lawsuit.[11] Several issues can arise from mediation settlement agreements that are not adequately concluded or sufficiently documented. Thus, at the conclusion of a successful mediation, the mediator and the participating lawyers must ask the question exactly how should the settlement be memorialized in order to be enforceable. Consider the following cases.

In *Goodrich Corporation v. Autoliv ASP*,[12] the parties signed a handwritten "memorandum of settlement" at the end of a day long mediation.

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9 *Wimsatt* at 48.

10 *Wimsatt* at 52.

11 *Levy v. Superior Court*, (1995) 10 Cal.4th 578, 584-585.

12 2005 Cal.App.Unpub. Lexis 2109.

The memorandum stated that the parties intended to settle all issues of the action and all also intended that the memorandum of settlement be "binding and admissible for purposes of a motion to enforce this agreement pursuant to Code of Civil Procedure section 664.6." But when the defendants appealed the trial court's granting of a motion for judgment under section 664.6, the Court of Appeal reversed the decision finding that the memorandum of settlement could not form the basis of a judgment under section 664.6 because it lacked sufficient details of mutual assent. Citing the published decision of *Wellington Productions, Inc. v. Flick*,[13] the Court noted that the parties' manifestation of assent must show that the parties agreed on all of the same things in the same sense. If there is no evidence showing that the parties agreed to the "same thing" then there is no mutual consent to contract and no contract is formed.

In the *Wellington* case a mediation settlement agreement included a clause requiring the parties to formalize a licensing agreement that would include a "fully paid up license," but neither defined "licensing agreement" nor "fully paid up license". The Court of Appeal found that no contract had been formed because the parties had never objectively manifested an agreement to the essential terms of the licensing arrangements, including for example, the scope of the license, permitted uses, grounds for termination, indemnity provisions and the like.

On the other hand, in the unpublished decision of *Tender Loving Things, Inc. v. Robbins*,[14] the Court of Appeal upheld a judgment entered on an order granting a motion to enforce the settlement agreement as a judgment pursuant to section 664.6 because the settlement agreement contained sufficiently specific and detailed terms to evidence the intention to be bound, even though some elements of portions of the agreement were reserved for inclusion later in a future final agreement to be prepared after the fact.

In *Tender Loving Things*, the parties resolved their controversy at the end of two (2) days of mediation. At the conclusion of the mediation the parties and their attorneys entered into a written eight (8) page "stipulation for settlement" which listed numerous detailed terms of agreement related to the disputed issues. The "stipulation for the settlement" contemplated a more formal "final agreement" that would contain additional incidental terms, including an ADR provision, to be agreed upon between parties. The stipulation also, as in *Goodrich*, provided that the stipulation itself could be enforced as a judgment pursuant to section 664.6. When post mediation negotiations regarding the form of that final agreement broke down, the plaintiff sought enforcement of the agreement pursuant to section 664.6. The trial court granted enforcement.

At the trial court and on appeal the defendants argued that the stipulation for settlement was uncertain because it lacked resolution of certain terms and that the expectation that the parties would subsequently draft a final settlement agreement proved that the parties did not intend the stipulation to be a binding contract. But the Court of Appeal disagreed and found that the language calling for preparation of final agreement merely reflects the parties' desires, ascertainable from the stipulation for settlement itself to flush out some of the incidentals, including, for example, more specific provisions regarding arbitration of disputes. But those additional terms were found to be minor or

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[13] (1998) 60 Cal.4th 793.

[14] (2005) Cal.App.Unpub. Lexis 3470.

incidental to the heart of the settlement agreement, which was specific and enforceable in its own right.

In enforcing mediation settlement agreements the Courts will regard the written settlement agreement, stipulation, term sheet, or writing bearing any other designation, as an agreement to be analyzed under standard contract principles. Whether the writing will be enforceable will depend upon the intent of the parties as found in the writing and on whether the terms contain the necessary certainty and definiteness to be enforced. Therefore, the key to enforcement of a mediation settlement agreement lies in the adequacy of counsel's preparation in advance of the mediation to be in a position to properly document the resulting compromise. While many mediators will offer a "form" of settlement agreement, containing blanks for completion at the end of the mediation session, counsel should be wary of and not become victimized by the form. Taking the time to identify all of the essential elements of the agreement and ensuring that each is specifically addressed in the written settlement agreement with enough specificity and detail to allow a court to enforce the agreement under the statutory scheme, even if it is anticipated that a further, more complete and formal agreement will be drafted and executed in the future is essential. Should the contemplated further, more complete and formal agreement fail to transpire, the court must be able to look at the term sheet signed at the end of the mediation session and find sufficient mutual assent and adequate specificity of details on the essential elements of the agreement to enforce it using the summary procedures of section 664.6.

VII. Tips for Success.

Preparation is the key to successful mediation at every level of the process. Counsel must be prepared by understanding the case sufficiently to assess how mediation can assist the parties in leading to a resolution. Counsel must also take special care to prepare his client for the mediation process. The client should be instructed on how the mediation is likely to proceed and unfold during the course of the day. The clients must be instructed upon and understand the difference between mediation and the discovery and trial procedures or its alternatives. Clients should be well versed in understanding the nature of confidentiality so that they can be empowered to participate voluntarily and be open about recognition of their opponent's case, which are the key ingredients to success.

Clients must be cognizant of the non-binding nature of the process and truly understand that ultimately not only participation in the mediation but also acceptance of the outcome of resolution are entirely within the clients' power and control. Clients should be prepared to discuss and acknowledge weaknesses of their case as well as their strong points and understand that their goal is settlement, but at a mutually acceptable and appropriate amount. Finally, clients must be educated about what happens if mediation fails and the case does not settle.

Counsel must prepare the other side for successful mediation. This means counsel must be able to obtain, marshal and articulate sufficient meaningful information for the other side to adequately receive, evaluate and understand the strengths of the advocate's case. Likewise, counsel must be prepared by assuring that he has obtained the necessary information, facts, documents, and contentions from the other side sufficiently in advance to assess, analyze and synthesize an objective evaluation of the other side's case before the mediation process commences.

Counsel on both sides must also prepare the mediator for success by arming the mediator with sufficient information and disclosure to empower the mediator to successfully facilitate the open and confidential communication that is necessary to lead the parties to resolution. Communications to the mediator should not be open and public. In addition to an exchanged mediation brief counsel should consider a private mediator's letter that shares important information that the mediator may need to know to guide the parties toward resolution even if that information must remain confidential and not be disclosed to the other side.

VIII. Conclusion.

More likely than not today's case will be resolved by mediation. Only one percent (1%) of unlimited civil cases in California are disposed of by jury trial. Less than ten percent (10%) are disposed of by bench trial.[15] Nationwide the U.S. Department of Justice reports that only three percent (3%) of all civil cases ever reach a jury or bench trial.[16] Given this landscape, mediation is more than just an alternative dispute resolution forum. It is a useful and helpful tool in resolving conflict in an expeditious and affordable way.

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[15] CA. Ct. Stat. Report (2007). http://www.courtinfo.ca.gov/referencedocuments/csr2007.pdf

[16] Bureau of Justice Statistics Bulletin, "Civil Trial Cases and Verdicts in Large Counties, 2001 (April 2004). http://www.ojp.usdoj.gov/bjs/pub/pdf/Huk01.pdf

Law Offices of

A. PETER RAUSCH, JR.

Attorneys and Counselors at Law

MAIN OFFICE	SAN FRANCISCO OFFICE	CENTRAL COAST OFFICE	ONLINE
7488 SHORELINE DRIVE, SUITE A-2	*225 BUSH STREET, 16TH FLOOR*	*311 BONITA DRIVE*	COUNSEL@RAUSCH.COM
STOCKTON, CA 95219	*SAN FRANCISCO, CA 94104*	*APTOS, CA 95003*	WWW.RAUSCH.COM
209 952 5000	***415 951 9600***	***831 688 5335***	*FAX 209 952 5009*