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## "The Gambler" of Mediation

By Curtis N. Stambaugh

In his epic song "The Gambler" Kenny Rogers advises "You got to know when to hold em, know when to fold em, know when to walk away and know when to run." In many respects, The Gambler could have been teaching a lesson on defense mediation tactics.

Mediation has become a litigation tool that is replacing the trial in our civil system of justice. An "impartial" mediator's job is to bring both sides to a settlement, and mediators often quip that they have succeeded at the mediation when everyone leaves a little bit unhappy. The key is to find each party's tolerance for pain and then convince them that a trial will take them beyond that threshold. Good mediators can be very convincing, and can make even the most seasoned litigator question their evaluation of the case.

Which brings us back to Kenny Roger's advice: It is critically important to have a firm knowledge of your case, both factually and legally before mediating. Understand fully the strengths and weaknesses of your case. Mediation will never be successful unless you are willing to consider a result at trial that is worse than you expect. However, a good gambler knows to believe in the strength of his or her hand, even when faced with a convincing bluff, and that tactic is no different in mediation.

The mediator is trying to bluff you into thinking that your opponent holds a better hand than they really do. Likewise, during the shuttle diplomacy that is the hallmark of most mediation, the mediator should also be trying to convince your opponent that you hold a better hand than you do.

Perhaps the most important advice from "The Gambler" is to "know when to walk away." This becomes especially true at a mediation where you believe your liability exposure is very low. A recent case illustrates this key point. We represented one of two defendants in a truck accident fatality. We had a strong belief that our client had no liability in the accident, but were willing to participate in mediation, because the right price could make a settlement cost-effective. We entered the mediation willing to offer up to \$25,000, which seems a very small sum in a fatality case. The mediator worked very hard to convince us that our position was unreasonable, and that we would lose at trial. With great deference and respect, we listened to his view, but in our private caucus, concluded that nothing that was said made us re-evaluate our position. Our position remained constant that the other defendant had primary liability (in addition to significant comparative negligence by the decedent). We were willing to contribute something to a global settlement, but we were

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not in a position to make settlement happen, because we did not see our client as having liability.

After several hours, we decided to “walk away” from the mediation. This is a difficult decision to make, and must be handled appropriately. We asked if we could speak directly with the decedent’s family (with their counsel present) and we were given permission to do so by their counsel and mediator. We explained that we sympathized with their tragic loss, but that we believed they needed to focus their efforts for settlement on the other defendant. This is a very important discussion to have, if permitted, because in this circumstance, we would likely see the other party at a later day in court. We explained that we simply had a different perspective on the case than they did, and that fortunately, the American system of justice allows for a jury to figure the matter out when the parties cannot reach an agreement. The family seemed to appreciate our message.

Ultimately, the family settled with the other defendant for approximately \$600,000. We filed a motion for summary judgment as we indicated we were planning to do at the mediation. The trial court granted our motion. This confirmed the strategy of “walking away” at the mediation.

The lesson to be learned is this: mediation is a very valuable tool in the litigation toolbox, but so is trial. If you believe strongly in your position, do not be afraid to “walk away” from a mediation. ■



**Curtis N. Stambaugh** is chair of the Oil and Gas Group and practices in the Transportation, Distribution and Logistics Group and also in Environmental Law and Toxic Tort, and Food Industry Groups.  
*cstambaugh@mwn.com / 717.237.5435*



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#### McNees Transportation, Distribution and Logistics Group

Barbara A. Darkes, Chair  
717.237.5381/bdarkes@mwn.com

Kandice J. Giurintano  
717.237.5452/kgiurintano@mwn.com

Kimberly A. Selemba  
717.237.5359/kselemba@mwn.com

James J. Franklin  
717.237.5375/jfranklin@mwn.com

Schaun D. Henry  
717.237.5346/shenry@mwn.com

Curtis N. Stambaugh  
717.237.5435/cstambaugh@mwn.com

The *Transportation, Distribution and Logistics Alert* is edited by Kimberly A. Selemba. Kimberly is a member of the firm's Litigation, Injunction, and Transportation, Distribution and Logistics practice groups.

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