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Handout:

**Mediation of Business Disputes Involving Small
Businesses**

Submitted By:
John Francis Gough, Esq.
Gough Law Associates, RLLC
Philadelphia

Biography

FACULTY:

John Francis Gough, Esquire

Mr. Gough has extensive experience in the private practice of law, having been a Partner and Of Counsel at several of Philadelphia's largest and most prominent law firms, including White and Williams; Hoyle, Morris, & Kerr; and Montgomery, McCracken, Walker, & Rhoads. He established his own firm, Gough Law Associates, RLLC, in 2005 with the goal to provide responsive, experienced and effective legal advice and assistance to selected clients. Mr. Gough concentrates his law practice in commercial, corporate and real estate transactions; business workouts and selected Chapter 11 engagements; dispute resolution by arbitration and mediation; as well as, expert testimony in cases of alleged attorney malpractice in business and bankruptcy matters.

A CONVERSATION WITH A MEDIATOR

John Francis Gough, Esquire
Gough Law Associates, RLLC
1500 Market Street, Suite 3900
Centre Square West Tower
Philadelphia, Pa. 19102
Phone: 215-568-5685
Fax: 215-568-5686
Email: jfg@goughlawassociates.com
Web: www.goughlawassociates.com

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WHY (NOT) TRY MEDIATION?

1. Contrasting mediation to both litigation and arbitration:
 - (a) not win / lose
 - (b) but can-live-with / can-live-with.
2. Factors favoring mediation:
 - (a) lower cost to resolution
 - (b) shorter time to resolution
 - (c) avoids the risk of losing
 - (d) can achieve closure, healing of relationships.
3. Mediation is not threatening to the participants:
 - (a) no result can be imposed
 - (b) participants retain control of the process
 - (c) outcome is only what the participants agree to
 - (d) whether or not successful, the process remains confidential
(42 Pa C.S. sec 5949; Pa. R. Civ. P. 4011)
 - (e) even if not completely successful, partial success is beneficial.
4. Mediation is a low cost, risk-free attempt to reach a can-live-with result.
Why not explore it?

WHAT TO LOOK FOR IN A MEDIATOR – AND WHY.

1. Mediation of business disputes where the parties are represented by counsel involves a dynamic that is critically different from other types of mediation without counsel for the parties, in several ways:
 - (a) pending or threatened litigation raises the stakes and the temperature
 - (b) each “participant” has two components: the lawyer and the client -- whose respective goals and motivations may not be completely congruent
 - (c) but both lawyer and client must be willing to accept a can-live-with result
 - (d) and both lawyer and client must view the mediator as a “welcome facilitator”.

2. In order for the lawyers (who will make or approve the selection) to view the mediator as a “welcome facilitator”:

- (a) the mediator should have a good reputation as a lawyer
- (b) the mediator should have a reputation for integrity and fairness
- (c) the mediator should have a reputation for mature judgment.

3. In order for the clients to view the mediator as a “welcome facilitator”:

- (a) the mediator should present as being likeable
- (b) the mediator should present as fair and unbiased
- (c) the mediator should be a good and empathetic listener
- (d) the mediator should be a good and empathetic questioner
- (e) the mediator should be calm, respectful and patient.

4. After the decision to explore mediation, the second most important decision is the selection of the mediator. The lawyers will be looking for a mediator they respect and the clients will be looking for a mediator they feel they can trust.

ELEMENTS OF THE MEDIATION PROCESS:

1. A written agreement to mediate the dispute before the mediator in question:

- (a) generally describing the scope of the dispute
- (b) agreeing that the entire mediation process will remain confidential among the participants vis-a-vis third parties
- (c) agreeing that communications with the mediator by one participant will not be disclosed by the mediator to the other participant without the first participant’s consent or direction
- (d) agreeing that any agreed resolution will be final and un-appealable
- (e) agreeing that the participants will equally share the mediator’s compensation
 - (i) at a stated hourly rate (for preparation and mediation) with
 - (ii) an initial retainer and
 - (iii) final payment promptly upon completion of the media whether successful or unsuccessful.

2. Establish the mediation timetable:

- (a) the date for submission of each participant’s mediation statement, of any length, (confidential to the mediator), containing:

- (i) a detailed description of the dispute
 - (ii) the legal issues and authorities relied upon
 - (iii) the undisputed and the disputed facts
 - (iv) copies of relevant documents and court papers
 - (v) the negotiating history
 - (vi) the submitting participant's current proposal for resolution.
- (b) establish two dates for the mediation itself:
- (i) the principal date (allowing for a full, uninterrupted day to last until an agreed late hour, if necessary)
 - (ii) a tentative follow-up date shortly after the principal date
- (c) This timetable should be part of or attached to the written agreement.

3. At the mediation session(s), there must be present for each participant someone with full authority to commit and settle.

4. At the mediation session(s), the mediator will meet with the participants and/or their lawyers jointly and in separate caucuses as the mediator deems most useful.

5. The mediator should permit and, in fact, should encourage *ex parte* communications including meetings (confidential to the mediator) by participants (lawyers or lawyers and clients) with the mediator at any time.

6. If the mediation is successful, the participants should sign a written term sheet at the end of the session, outlining the agreed resolution. A more formal document may follow if appropriate.