

**THE REAL PROPERTY AND ADR SECTIONS  
OF THE SAN DIEGO COUNTY BAR ASSOCIATION**

**Present**

**Part 1 of a 2 Part Program**

**RESOLVING REAL ESTATE DISPUTES**

**Part 1 MEDIATING REAL ESTATE CASES**

**Speakers**

**Sean Ponist, Esq.**

**Bob Flynn, Mediator**

**John Campbell, Esq.**

**Harold Coleman, Jr., Mediator**

**October 13, 2016**

**Part 2 Arbitration of Real Estate Disputes is being presented on November 21, 2016 at this same venue.**

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# MEDIATING REAL ESTATE CASES

## TABLE OF CONTENTS

### Presenter Biographies

**Biographies..... 1-4**

### Presentation Outline

#### MEDIATING REAL ESTATE CASES

**I. MEDIATION 101 ..... 5-6**

- A. Differences between mediation and arbitration or litigation
- B. Advantages of mediation

**II. GETTING TO MEDIATION ..... 6-7**

- A. Agreeing to mediate
- B. Agreeing to a mediator
- C. Preparation

**III. MEDIATOR’S ROLE .....7-8**

- A. Main objective
- B. Mediations and Variations Thereof
- C. To express or not to express opinions
- D. Ethical concerns limiting mediator

**IV. OPENING MEDIATION SESSION AND ADVOCATE REMARKS ..... 8**

**V. CAUCUS CONVERSATIONS WITH EACH SIDE ..... 8**

**VI. ADDRESSING COMMON ISSUES AND PROBLEMS AT MEDIATION .....8**

**VII. MEDIATION STRATEGIES ..... 8-9**

- A. Advocate strategies
- B. Mediator strategies
- C. Mediator bag of tricks

**VIII. NAILING DOWN A SETTLEMENT ..... 9**

- A. Form of the settlement agreement
- B. Omitting “important” settlement terms
- C. Oral settlement agreements?

D. Code of Civil Procedure § 664.6 and enforceability

**IX. CONCLUSION ..... 10**

**APPENDIX**

**Case Example ..... A-1**

**CAR Purchase and Sale Agreement ..... A-2**

**CAR Real Estate Transfer Disclosure Statement ..... A-3**

**CAR Exempt Seller Disclosure ..... A-4**

**CAR Seller Questionnaire ..... A-5**

**CAR Buyer Inspection Advisory ..... A-6**

**CAR Agent Visual Inspection Advisory ..... A-7**

## **PRESENTER BIOGRAPHIES**

### **SEAN E. PONIST, ESQ.**

Sean Ponist is the owner of the Law Offices of Sean Ponist, P.C., a firm specializing in real estate, construction defect and business litigation. Prior to founding his own firm, Mr. Ponist was a prosecutor with the Marin County District Attorney's Office and in-house counsel for Marcus & Millichap Real Estate Investment Brokerage Company. He has successfully tried over 25 cases to verdict. For the past five years, Mr. Ponist has been recognized as a Super Lawyer and has also been recognized as being one of the Best of the Bar by the San Diego Business Journal.

Mr. Ponist has also published numerous articles on real estate topics, including recent articles in The Daily Journal ("Recovering Lost Profits in Real Estate Transactions" and "Should Equitable Indemnity Apply Against Negligent Misrepresentation Claims?"), California Lawyer magazine ("The Nonrefundable Deposit – Not!") and Commercial Investment Real Estate ("Going to the Source: Minimize your liability by providing attributions").

He has further lectured for the San Diego County Bar Association ("Deconstructing Commercial Leases" and "Commercial Real Estate Brokerage Standard of Care"), San Francisco Bar Association ("Bringing Down the House: Assessing Damages in Real Estate Cases," "Best Use of Experts in Real Estate Cases," "The Rogue Agent: Agency Issues In Real Estate," "Private Investigation and the Legal Community," and "Commercial Real Estate Brokerage Standard of Care," and "Contract Interpretation"), the San Mateo County Bar Association ("When Real Estate Deals Go Bad," "Expert Witnesses at Trial," and the "Agent-Principal Relationship") as well as for the National Business Institute ("Direct and Cross-Examination for Civil Litigators").

Mr. Ponist graduated from *UC Davis School of Law*, receiving his Juris Doctor degree in 1999. Prior to law school, Mr. Ponist attended *UCLA* where he earned a Bachelor of Arts in Philosophy in 1995 and was a Departmental Scholar.

## **ROBERT H FLYNN, ESQ., MEDIATOR**

Bob Flynn is an AV rated attorney, repeatedly been named a SuperLawyer (including 2016) with a perfect 10 AVVO rating. He is a member of the Massachusetts Bar, the 1<sup>st</sup> Circuit USDCA, the USDC for MA and the United States Supreme Court! He has been a trial lawyer, mediator and arbitrator over the course of a few decades and has represented professionals over those years including many lawyers and real estate brokers/agents. He has mediated and arbitrated as a neutral for over 15 years his work as a neutral today is restricted to real estate and construction matters.

He was first licensed as a real estate broker in MA and is today a licensed CA real estate agent, BRE# 01970581. He leads the Fairway Residential Team at Keller Williams Realty in Carmel Valley/Del Mar working with residential sellers, buyers and investors throughout San Diego County and he focuses on working as a real estate agent with lawyers and fiduciaries whose clients are selling real estate.

- Lawyers intuitively understand in divorce and business dissolutions the value to having a realtor experienced as a lawyer and mediator!
- Lawyers selling probate property value a marketing strategy sensitive to their ethical duties to the clients, beneficiaries and the court.

“I like to think of my role as an agent as being a real estate resource and advisor for lawyers and fiduciaries and their clients whose real property is to be sold. Often it takes the nuanced sensitivity of an experienced lawyer acting as a real estate agent to negotiate a real estate deal and then project manage its escrow process, making sure that counsel and clients are ready for the Probate Court approval process and using the conflict resolution skills of an experienced mediator facilitate the conversation spouses need to have when selling marital real property. Lawyers appreciate having a lawyer/realtor on their team!”

## **JOHN CAMPBELL, ESQ.**

John B. Campbell is the Senior Partner and founder of the Campbell Law Group (“CLG”). Mr. Campbell is an experienced trial lawyer and has extensive experience in real estate litigation and insurance defense matters. He is licensed to practice law in the States of California, Nevada, Massachusetts and Rhode Island. Mr. Campbell has been admitted to practice before all of the Federal Courts in California and Nevada; he has also been admitted to practice before the United States Supreme Court. Mr. Campbell graduated from Harvard University, with a BA in Psychology in 1970; and he received his JD from Boston College Law School in 1973.

From 1973-1977, Mr. Campbell served as a Lieutenant in the United States Navy JAG Corps, specializing in criminal litigation. While serving first with the Marine Corps in Southeast Asia, and then with the Navy in San Diego, Mr. Campbell prosecuted and defended over 150 general and special court-martials that were tried to completion. In civil practice, Mr. Campbell has tried over 30 complex civil jury trials. Many of those trials involved millions of dollars of exposure. Mr. Campbell has also handled hundreds of binding and non-binding arbitration and mediation proceedings.

Over the past several years, Mr. Campbell has been recognized as a “Top Lawyer in San Diego” – Highest in Ethical Standards & Professional Excellence. Since 1978, Mr. Campbell has specialized in the representation of medical practitioners, restaurant clients; real estate clients; clients involved in construction litigation; insurance carrier clients – for the defense of legal and medical malpractice cases, high-exposure catastrophic injury cases, construction defect cases, insurance bad faith, subrogation and declaratory relief cases; and clients who were involved in other non-insured complex litigation matters (i.e., involving unfair competition/antitrust; fraud; and breach of contract issues).

Mr. Campbell has developed expertise in the representation of buyers/sellers/real estate agents in residential real estate transactions – including the sale of residential/commercial properties with undisclosed defects. Mr. Campbell provides advice and litigation services in connection with such disputes. Mr. Campbell also provides such services to his clients involved in the purchase of commercial and/or industrial real estate.

Mr. Campbell has also been involved in the following published appellate decisions: Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Company, Inc. (1991) 234 Cal.App.3d 1724, 286 Cal.Rptr. 435; Shaffer v. Debbas (1993) 17 Cal.App.4th 33; 21 Cal.Rptr.2d 110; Alcala Company, Inc. v. Superior Court (1996) 49 Cal.App.4th 1308, 57 Cal.Rptr.2d 349; University Canyon Homeowner Association v. Collins Development Company, et al. (2000) 81 Cal.App.4th 771, 97 Cal.Rptr.2d 83. Mr. Campbell has been involved in the following appellate opinions that were not certified for publication by the 4<sup>th</sup> District Court of Appeal: Noon v. U.S.A. Track & Field, et al. (1998); Smith, et al. v. San Dieguito Unified High School District, et al. (2001); and Hirsch, et al. v. Pacific Crematorium, Inc., et al. (2006).

## **HAROLD COLEMAN, JR., ESQ., MEDIATOR**

Harold Coleman, Jr., Esq., is principal of *Harold Coleman Jr. Ltd.* (2004 to date), a San Diego-based conflict-management firm that delivers solution-focused and value-driven professional alternative dispute resolution (ADR) services in the areas of real estate, construction, commercial, consumer, business and employment law, with a practice focus in complex technical disputes and pre-dispute avoidance. As an ADR professional, he also serves as senior executive for mediation at the American Arbitration Association (AAA) – the global leader in dispute resolution services worldwide.

Coleman is an ADR panelist with the *Superior Court of California's* Civil Mediation Program, the *San Diego Association of Realtors'* Real Estate Mediation Center, the *San Diego County Bar Association's* attorney/client fee arbitration and mediation committees, and the AAA's Large & Complex Case (LCC) panel for commercial and construction disputes. He is a licensed attorney, licensed real estate broker, and credentialed mediator, arbitrator and educator who since 1987 has served the international business and legal communities in resolving complex litigated and non-litigated disputes through innovative ADR applications of interest-based negotiation, facilitation, mediation, independent fact-finding, early neutral evaluation, and binding arbitration. He is a former civil-litigation attorney (*McInnis, Fitzgerald, Rees, Sharkey & McIntyre*, 1990-97; *Gaglione, Coleman & Greene, LLP*, 1997-2004) with expertise in complex technical litigation. He is a professional trainer who routinely trains corporate management teams in ADR, communication, conflict management, claims prevention, strategic planning, and critical thinking/problem solving, among other enterprise risk-management themes. His corporate clientele includes *The Boeing Company*, the global aerospace leader.

A former project design engineer and multi-disciplinary project manager (*County of San Diego, Office of Architecture & Engineering*, 1980-90; *Arizona Department of Transportation*, 1975-80), Coleman's ADR expertise has actively facilitated the resolution of several hundred mediated and arbitrated complex disputes, with an aggregate case disposition value well exceeding 500-million dollars.

Among other honors and awards, Coleman has been recognized by the *State Bar of California* in 2000 with its "Distinguished Service to the Legal Profession" citation. More recently, Coleman in 2009 was inducted as Fellow of the prestigious national *College of Commercial Arbitrators*, comprised of the most esteemed neutrals in the industry. In 2011, Coleman was appointed to the international Board of Directors of the AAA. In 2012, Coleman was appointed to the CCA's national Board of Directors and in 2013 to the Board of Directors of the *International Mediation Institute*.

## MEDIATING REAL ESTATE CASES

### I. MEDIATION 101

#### A. Differences between mediation and arbitration or litigation

1. Audience
2. Power
3. Presenting provable facts
4. Presenting legal issues for decision
5. Key distinctions – *Adjudication* (arbitration, litigation) versus *Mediation*

(also see handout, “The Dispute Resolution Continuum”)

- *Adjudication:* Third-party tribunal decision making  
*Mediation:* Party decision making, based on “self-determination”
- *Adjudication:* Law and fact based  
*Mediation:* Interest and needs based
- *Adjudication:* Third-party tribunal takes testimony, admits evidence, issues binding decision  
*Mediation:* Mediator assists parties communicate, evaluate options/proposals, negotiate settlement terms, consider “no-agreement” alternative/next steps
- *Adjudication:* Formal rules, procedures  
*Mediation:* Informal, relaxed procedures
- *Adjudication:* Extensive discovery typically required  
*Mediation:* Minimum discovery
- *Adjudication:* Party communications are indirect  
*Mediation:* Party communications are more direct
- *Adjudication:* Judge/arbitrator holds hearing with all parties in formal setting; ex parte communications typically disallowed  
*Mediation:* Mediator convenes private and joint conferences in informal setting; ex parte communications allowed and essential to process
- *Adjudication:* Litigation is public; arbitration is private and confidential, with some exceptions (e.g., collective bargaining)  
*Mediation:* Mediation is private and confidential
- *Adjudication:* Resolution is imposed  
*Mediation:* Resolution is negotiated

- Adjudication: Costs comparatively higher than in mediation  
*Mediation:* Lower cost than adjudication
- *Adjudication:* Can take months, years to conclude  
*Mediation:* Can take only hours, days to resolve
- Adjudication: With 90-99% pre-trial settlement rates nationally, reinforces ADR process of negotiation (litigation is a settlement agent!)  
*Mediation:* Reinforces ADR process of negotiation and early resolution (mediated-negotiations enjoy 83% success rate)

## **B. Advantages of mediation**

1. Voluntary/Nonbinding
2. Party participation
3. Cost Savings
4. Speed
5. Flexibility/creation resolutions
6. Preserving amicable relations
7. Narrowing disputed issues
8. Confidentiality

(See generally, *Rojas v. Coffin* (2004) 33 Cal.4th 407, 415; *Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 86; *Wimsatt v. Kausch* (2007) 152 Cal.App.4th 137, 150.)

## **II. GETTING TO MEDIATION**

### **A. Agreeing to mediate**

1. Mandatory mediation
2. Handling other side's refusal/reluctance to mediate
3. Goalposts and pre-mediation settlement efforts

### **B. Agreeing to a mediator**

1. Different selection methods
  - a. Letting other side chose so that they have greatest comfort
  - b. One side selects a handful and the other side picks therefrom
  - c. Any other way the parties want to do it
2. Professional/attorney mediators vs. judges

### **C. Preparation**

1. The mediation brief

2. Who needs to be present (or on telephone standby)?
3. Preparing the client for mediation
4. Preparing the case for mediation
5. Analyzing facts, law, risk, liability and damages as well as the costs of litigation/arbitration
6. Pre-mediation discussions with the mediator
7. “Let the process work!”

### **III. MEDIATOR’S ROLE**

#### **A. Main objective**

1. “The mediator's main objective is to help each side evaluate its position realistically and to keep the negotiations going, thereby moving the parties toward settlement.” (Judge H. Warren Knight (Ret.) et al., Cal. Prac. Guide: Alt. Disp. Res. (TRG) ¶ 3:119.)

2. A mediator’s only objective is to settle the case (facts, law, and everything is irrelevant)

#### **B. Mediations and Variations Thereof**

1. Traditional mediation—this is nonbinding mediation where the mediator assists the parties in reaching a resolution

2. “Binding mediation”—this is where the parties authorize the mediator to render a binding decision in the event an impasse is declared with respect to settlement negotiations. The parties' intent is that the dispute resolution procedure becomes, in effect, an arbitration. (See e.g., *Lindsay v. Lewandowski* (2006) 139 Cal.App.4th 1618, 1624)

3. Arbitration-mediation—this is where the parties arbitrate first before the arbitrator/mediator who thereafter prepares a written award but does not disclose it to the parties. The arbitrator/mediator then conducts a mediation in a last-ditch attempt to settle. If mediation is successful, the arbitration award is destroyed; if not, the parties are bound by the award (Judge H. Warren Knight (Ret.) et al., ¶ 3:12.11)

4. Mediation-arbitration—this is where the parties start with a traditional mediation but the parties agree in advance that if there is an impasse they will proceed to arbitration before the same person who acted as mediator. The arbitration may commence immediately or at some agreed date after an impasse is declared. (Judge H. Warren Knight (Ret.) et al., ¶ 3:12.1)

#### **C. To express or not to express opinions**

1. In “classic” mediation, the mediator's role is simply to facilitate the parties' direct negotiations. The mediator does not offer his or her own opinions as to either side's position, or the settlement value of the case, or the likely outcome if the case went to trial/arbitration. (*Furia v. Helm* (2003) 111 Cal.App.4th 945, 954.)

2. Most mediators, however, offer opinions. Mediators may opine regarding the likely outcome of the case or the value of a legal claim if it were to be adjudicated or

otherwise advise what it would take to settle the case. (*Furia v. Helm, supra*, 111 Cal.App.4th at 954.)

**D. Ethical concerns limiting mediator**

“The mediator's primary role is to help disputing parties assess their positions realistically. To do so, the mediator may need to “educate” the parties as to their legal rights and obligations. If such “education” is perceived as giving legal advice to either or both parties, there are serious ethical problems.” (Judge H. Warren Knight (Ret.) et al., ¶ 3:119.)

**IV. OPENING MEDIATION SESSION AND ADVOCATE REMARKS**

- A. Joint Session Yes or No!
- B. Two different approaches to joint sessions

**V. CAUCUS CONVERSATIONS WITH EACH SIDE**

- A. Rapport or trust: mediators, lawyers and parties
- B. What’s the other side’s real case
- C. Why are we here now and why not settled
- D. What does mediator have to do or accomplish with the other side
- E. What’s greatest strength and weakness of each side
- F. Get a demand, get an offer and get the ball rolling
- G. The reciprocity principal and reciprocal concessions. (Robert B. Cialdini, Ph.d., *Influence: The Psychology of Persuasion* (Collins Business 2007) pp. 17-57.)

**VI. ADDRESSING COMMON ISSUES AND PROBLEMS AT MEDIATION**

- A. Ill prepared advocate and/or ill prepared clients
- B. Obstinate, angry, inflexible, stuck and/or threatening to walk
- C. Too high an opinion of own success and/or lack of respect for other side or other case
- D. Should mediator ask for bottom line/maximum will pay
- E. Non-monetary goals

**VII. MEDIATION STRATEGIES**

**A. Advocate strategies**

- 1. Reasonableness
- 2. Unreasonableness

**B. Mediator strategies**

- 1. Finding the source of confusion or misunderstanding on each side

2. What the parties achieve or lose by settling or deciding to go on to arbitration (uncertainty, costs, time, etc.)
  3. What is most important to each side
  4. BATNA analysis
  5. Likelihood of success on each issue and outcome and/or high/ low results
- for each

**C. Mediator bag of tricks**

1. Mediator's proposal
2. High-low

**VIII. NAILING DOWN A SETTLEMENT**

**A. Form of the settlement agreement**

1. Using the mediator's form
2. Bringing your settlement agreement

**B. Omitting "important" settlement terms**

A settlement agreement that omits an "important term that affects the value of the bargain" may still be enforceable if "the terms it does include are sufficiently definite for a court to determine whether a breach has occurred, order specific performance or award damages." (*Facebook, Inc. v. Pacific Northwest Software, Inc.* (9th Cir. 2011) 640 F.3d 1034, 1037-1038 (applying California law))

**C. Oral settlement agreements?**

"Some mediators speed up the process by using audio recorders. This allows the parties to set forth their agreement in detail. Caveat: An oral agreement is binding only if "made on the record" and reduced to writing in conformity with Ev.C. §§ 1118 and 1124." (Judge H. Warren Knight (Ret.) et al., 3:144.3)

**D. Code of Civil Procedure § 664.6 and enforceability**

1. Importance of CCP 664.6 enforceability
2. Statutory language—"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 enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."
3. The convoluted case of *J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 988.

## **IX. CONCLUSION**

A. Analysis as we go along about different strategies, techniques, approaches, how to and what not to do, or what works and does not work etc.

B. Why does mediation work

C. Why does it fail