

Stradley Ronon Stevens & Young, LLP  
2005 Market Street  
Suite 2600  
Philadelphia, PA 19103-7018  
215.564.8000 Telephone  
215.564.8120 Facsimile  
[www.stradley.com](http://www.stradley.com)

With other offices in:  
Washington, D.C.  
New York  
New Jersey  
Illinois  
Delaware



[www.meritas.org](http://www.meritas.org)

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## Clients Want Lawyers Who Know How to Settle Disputes Early: Thoughts on Guided Choice Mediation

Stradley Ronon ADR Practice Chair Patrick R. Kingsley (<https://www.stradley.com/professionals/k/kingsley-patrick-r>) sits down with arbitrator and mediator Paul Lurie, Director of the Guided Choice Mediation Interest Group, to discuss the changing landscape of alternative dispute resolution.

*Paul Lurie is an active arbitrator and mediator of the large complex panels of the American Arbitration Association and is a member of its Master Mediation Panel. He is also a member of the CPR neutral panels. He is focused on reducing the time and expenses of using arbitration and mediation. Paul is a leader of the worldwide Guided Choice Dispute Resolution Interest group that is improving the mediation process to reduce the time and expense of resolving business disputes.*

*Patrick R. Kingsley is chair of Stradley Ronon's alternative dispute practice group. Pat handles a wide variety of complex commercial disputes, focusing much of his practice on construction and surety litigation. As a trial lawyer, he has tried both jury and nonjury cases and has represented clients in arbitrations, mediations and hearings before administrative law judges and referees. He is also chair of the firm's construction practice group.*

### **Patrick R. Kingsley (PK): How is the legal business of dispute resolution changing?**

**Paul Lurie (PL):** The profession of dispute resolution is changing dramatically. Clients know the high probability that commercial disputes will never be adjudicated. Dispute resolution is on a timeline that includes settlement and ends with adjudication. Sophisticated clients appreciate lawyer teams that not only can try cases but also, just as importantly, can settle cases as soon as possible. They want lawyers whose fees are efficiency based on risk/reward strategies. Unlimited hourly rates are disappearing. Guided Choice Mediation strategies have been endorsed by the International Mediation Institute's project to implement the findings of the Global Pound Conference to provide measurable value to clients when using mediation. The Guided Choice Mediation Interest Group is a pro bono worldwide group of mediators, advocates, in-house counsel and academics. Our goal is to increase the use of mediation by demonstrating that the earlier a mediator is hired, the earlier a dispute will be resolved.

### **PK: How do lawyers miss the opportunity for the earlier resolution of commercial disputes?**

**PL:** Traditional lawyers seldom recommend to their clients hiring a mediator at the early stages of a dispute, before substantial costs have been incurred for pretrial/hearing activities. Often, lawyers view mediators as being most useful late in the legal process, after the parties have spent time and money on discovery and motion practice and are preparing

for a trial or hearing. A common attitude is that before being ready to recommend settlement negotiations, lawyers want to “prove” to their clients and the opposition that their client will win.

**PK:** What do clients consider a good settlement result?

**PL:** Clients’ perception of “winning” a good result can be different from that of their lawyers. When a settlement is in the clients’ best interest often depends on many business and psychological reasons besides the strength of the case. Often these factors are unknown or overlooked by counsel, who primarily focus on litigation-based risk analysis. The key to good and earlier settlements is for all the parties to understand what the parties consider (1) their best interest-based outcomes that are not perceived as losses, (2) what is causing the impasses to those understandings and how they can help overcome those perceptions and (3) what is the dollar and business expense and risk/reward of getting to a final resolution by settlement or adjudication.

**PK:** What unique contribution can mediators make to earlier settlements and reduction of dispute resolution costs?

**PL:** The best mediators are identified as “Guiding Mediators.” They understand how modern decision science affects settlement decisions. Mediators have the unique power to confidentially diagnose the causes of impasses preventing settlement. Too often, mediators are engaged late in the dispute resolution timeline. Guided Choice encourages mediators to be hired early and before the lawyers engage in their expensive adversarial tactics, which can reduce any interest in settlement. Based on the impasse diagnosis, a Guiding Mediator can help satisfy the needs of all the

parties before recommending the start of negotiations. Needs satisfaction may include more information exchange, re-evaluating outcome prediction, changing negotiators, consent of third parties, collaboration among experts and apologies from people who may not want to apologize. This needs satisfaction can be useful in reducing expenses, whether the case settles or is adjudicated. Needs satisfaction for client decision-makers is different from that of lawyers. Clients have an aversion to loss, which can be influenced by subconscious factors of which lawyers may not be aware.

**PK:** How can you overcome the resistance to the early hire of a mediator?

**PL:** Resistance to mediator early hire can come from opponents, insurers, in-house counsel and clients who have experienced previous mediation experiences as being “evaluative.” To overcome the resistance of parties who feel they are not “ready” to mediate, the mediation agreement can be clarified that the initial role of the mediator is not to preside over settlement negotiations until parties’ needs are satisfied. The mediator is someone clients can talk to confidentially to help them (1) understand their best interests in choosing to settle or not and (2) understand the needs of opponents and how a well-designed mediation process can change the positions of those “unreasonable” people. Parties who are not subject to a pre-dispute mediation agreement can agree on engaging the mediator initially only for (1) impasse diagnosis and (2) assist the parties to efficiently achieve their position change needs for information using collaborative rather than adversarial systems. Under such agreements, budgets can be set, and settlement negotiations would commence only with further consent of the parties.

*For more information, contact Patrick R. Kingsley  
at 215.564.8029 or [pkingsley@stradley.com](mailto:pkingsley@stradley.com).*