Mediation for Attorneys: The 2022 Tool Kit

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Agenda

- Introduction to Mediation
- Considerations of Mediation
- Selecting the right Mediator
- The Mediation Process
- Mediation Clause Language
- Case Examples
- Key Takeaways

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What is Mediation?

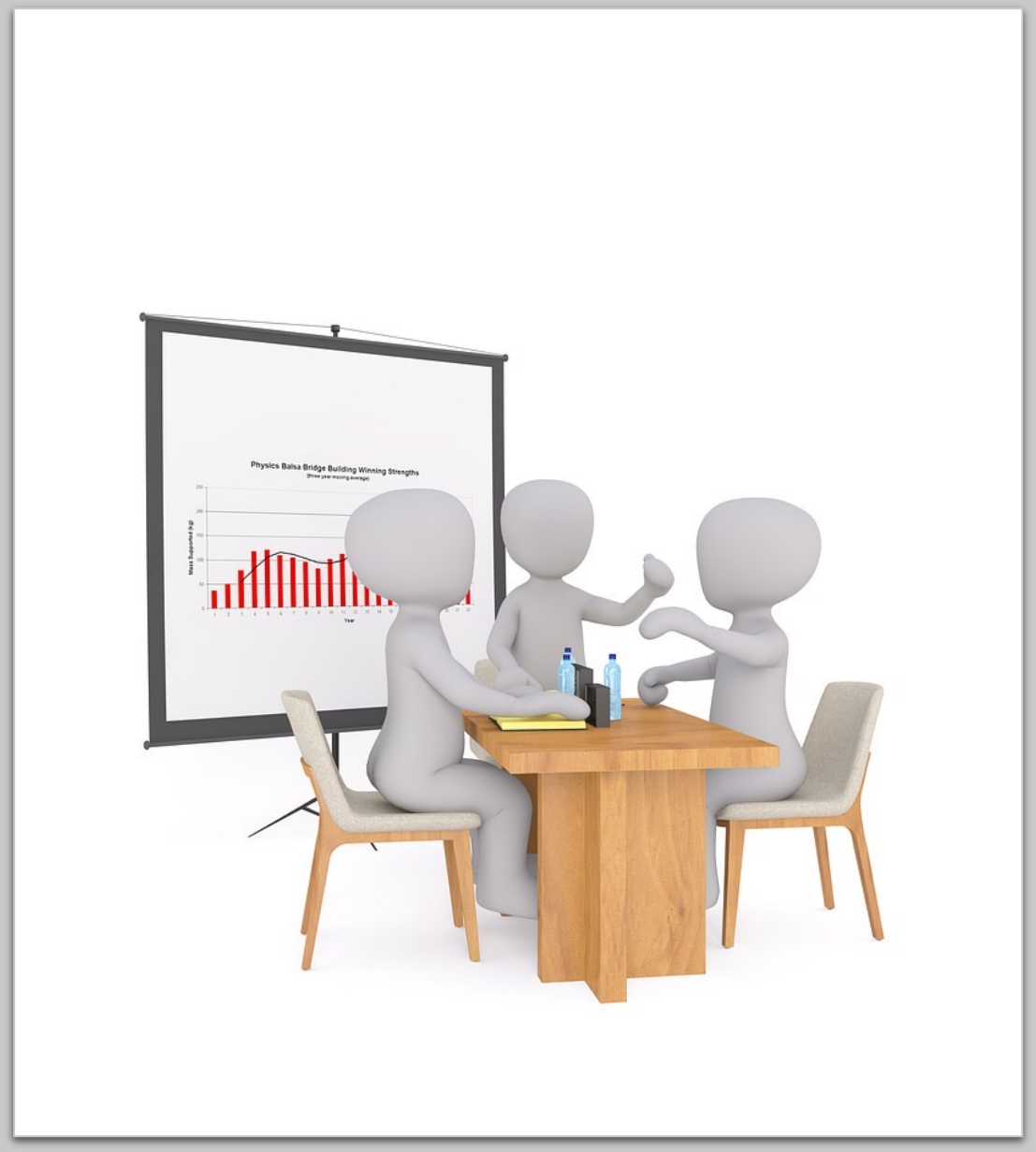
- A process of deliberation and discussion headed by a mediator who facilitates communication between parties regarding a dispute.
- Usually culminates in a meeting in person. However, since the COVID-19 pandemic, virtual mediation has steadily become the alternative to in-person meetings.
- Mediation often involves brief written submissions to the mediator stating the case.
- It is also often followed with a telephonic meeting after the mediation session.



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Mediation on the Rise

- There has been a change in litigation and dispute resolution during the past 25 years.
- Far more cases are resolved in alternative dispute resolution (ADR) than by trial, and the relative numbers continue to increase as mediation and arbitration continue to expand.



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Involved Parties in a Mediation

- Private 3rd Party Mediator
  - A Mediator has an education on e-discovery best practices/remedies along with technical knowledge.
- A Court Appointed Special Master
  - Working with a Special Master is more formal but ensures that the case is managed effectively.
  - Special Masters can be court appointed, and if parties cannot agree, the Special Master has decision making authority, subject to appeal.



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Considerations of Mediation



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Why Mediation May be Right for your Client?

1. Parties control process and outcome
2. Confidential
3. Saves time
4. Save money
5. Avoid or shortens litigation
6. Preserves relationship
7. Fair and neutral
8. Gives participants an opportunity to tell their story
9. Improves communication
10. Enables employees and employers to discovery real issues in the dispute.
11. Gives employer valuable information about the workplace.
12. Not threatening
13. Utilizes expertise
14. Is a forgiving process
15. Usually results in a "Win Win" outcome

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Additional Benefits of Mediation

Can get valuable input on insurance coverage program and/or cyber security from mediators with subject area expertise.

Keeping the dispute out of the courtroom allows for reduced media/publicity.

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When is Mediation Recommended?

- Sometimes, parties will have no choice regarding when to have at least one mediation. In some instances, the agreement at issue in the litigation demands that the parties mediate before filing a lawsuit or submitting a dispute to arbitration.
- If the timing of mediation is left to the parties, conventional wisdom recommends mediation as early as possible to avoid unnecessary attorneys' fees, expert fees, and other litigation costs. An early mediation may help save the parties' ongoing business relationship before litigation tactics irreparably sour the relationship.
- Additionally, there is little downside to an early mediation. Parties can mediate more than once during a lawsuit, though multiple mediations are not commonplace.



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What to Consider When Speaking with your Attorney?

- When considering whether the time is right to mediate, discuss with your lawyer the following:
  a) remaining factual and legal question marks,
  b) an estimated budget for the case through different procedural stages, and
  c) the other side's likely possible perspectives.



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Benefit of Mediation to the Clients' Attorneys

- Mediation usually leads to a swift resolution.
  - The ability to move cases to resolution is an ever-present problem for attorneys. This is complicated by court dockets that are backlogged and much time is spent waiting for a judge or jury to be assigned even on a day when a case is scheduled. Continuances are often requested by opposing counsel in routine matters which if resolved would limit the amount of manpower allocated to a particular case.
- Client satisfaction.
  - Personal injury cases, worker's compensation cases, contested divorces, business contract disputes can also be especially lengthy in a traditional court setting. Bringing the case to a speedy resolution is beneficial for all involved.



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Selecting the Right Mediator



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Mediator's Role

- Mediation leaves the decision power totally and strictly with the parties.
- The mediator does not decide what is "fair" or "right," does not assess blame nor render an opinion on the merits of a case under litigation.
- Rather, the mediator acts as a catalyst between opposing interests attempting to bring them together by defining issues and eliminating obstacles to communication, while guiding the process to avoid confrontation and ill will.
- The mediator will, however, see concessions from each side during the mediation process.



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What to Look for When Selecting a Mediator



Your mediator should be knowledgeable of the technical nuances of the issues. Find an expert in the field.



One of the most important parts of the mediator's job is guiding the parties and their lawyers through the technical nuances of the systems at issue.



It is important to keep in mind there are many areas of expertise in the field of technology and that competence in one area does not necessarily imply competence in another.



Therefore, it is critical that the mediator is not only technically competent, but also familiar with the specific information systems the insured is using.

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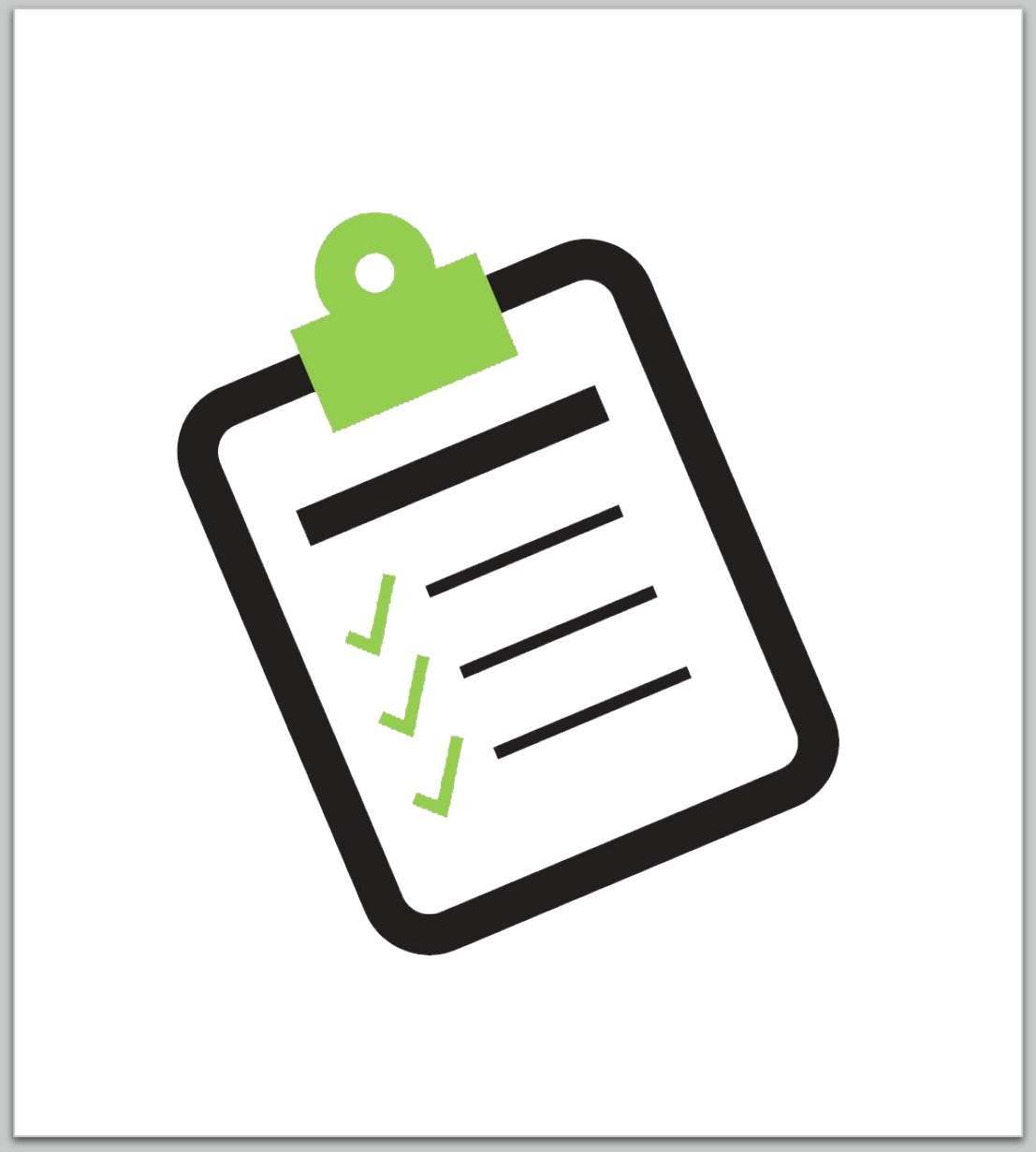
The Mediation Process



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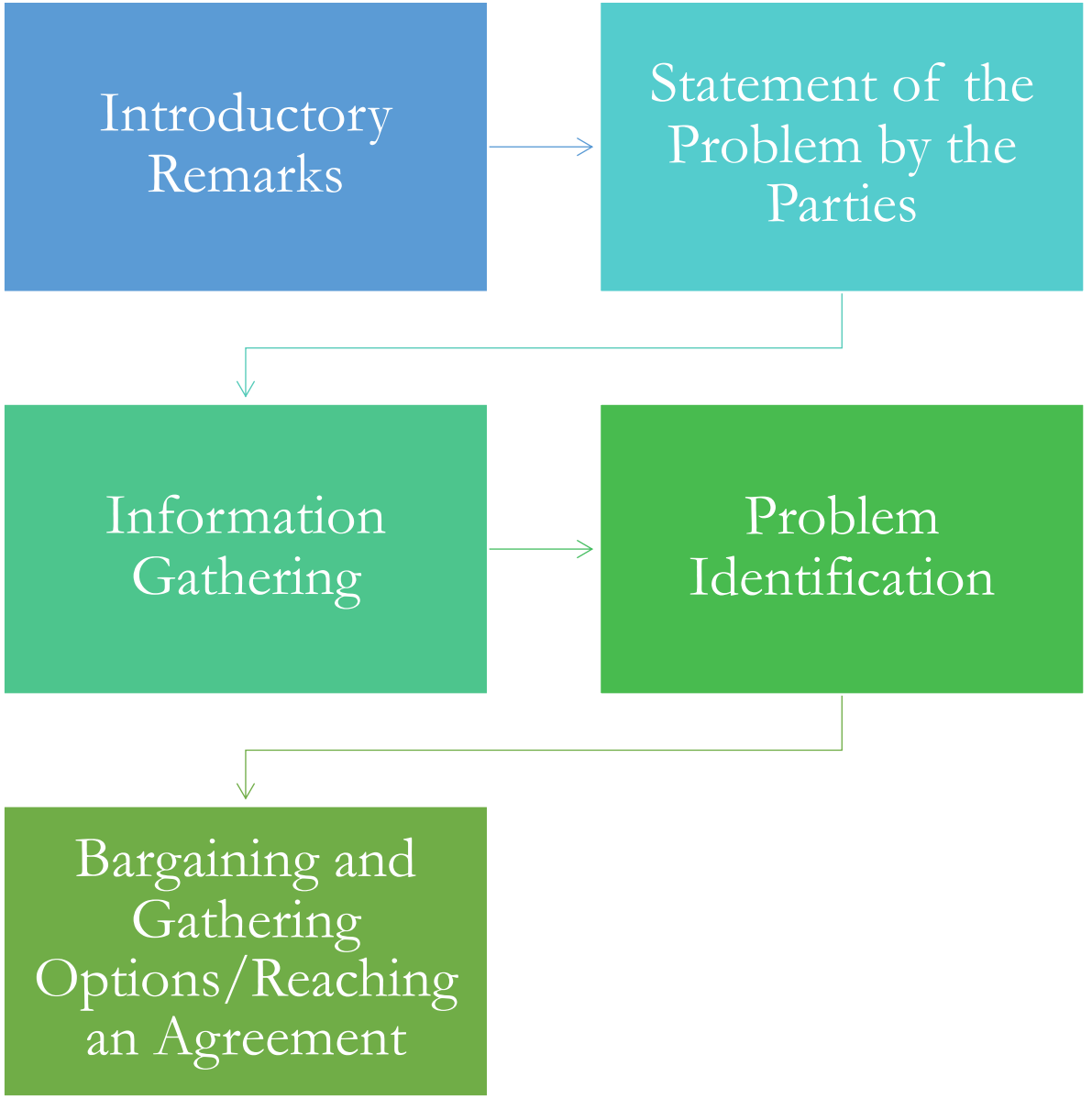
Pre-Mediation Checklist

- Any expectations from any prior settlement discussions (must check with all potential sources).
- Status of the dispute and discovery (if any) and information gaps that may impact your or the other sides ability to make a meaningful judgment on the case.
- Submissions - how long, exchanged with all sides or confidential for mediator's eyes only.
- Exchange briefs, with a brief confidential supplement, make the process better (for cyber, probably a must).
- Joint opening session - opening session is essential.



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Stages of Mediation



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Fundamental Points to Keep in Mind



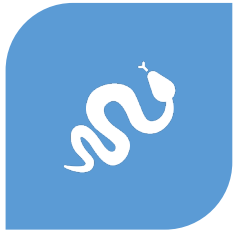
DON'T FORGET YOU CONTROL THE **OUTCOME**.



DON'T FORGET THE **AUDIENCE** IS YOUR OPPONENT AND THE NEUTRAL IS A FACILITATOR.



DON'T FORGET THE GOAL IS TO **ACHIEVE** A DEAL.



DON'T FORGET THIS IS **NOT ADVERSARIAL**.



DON'T FORGET THIS IS **CONFIDENTIAL.**

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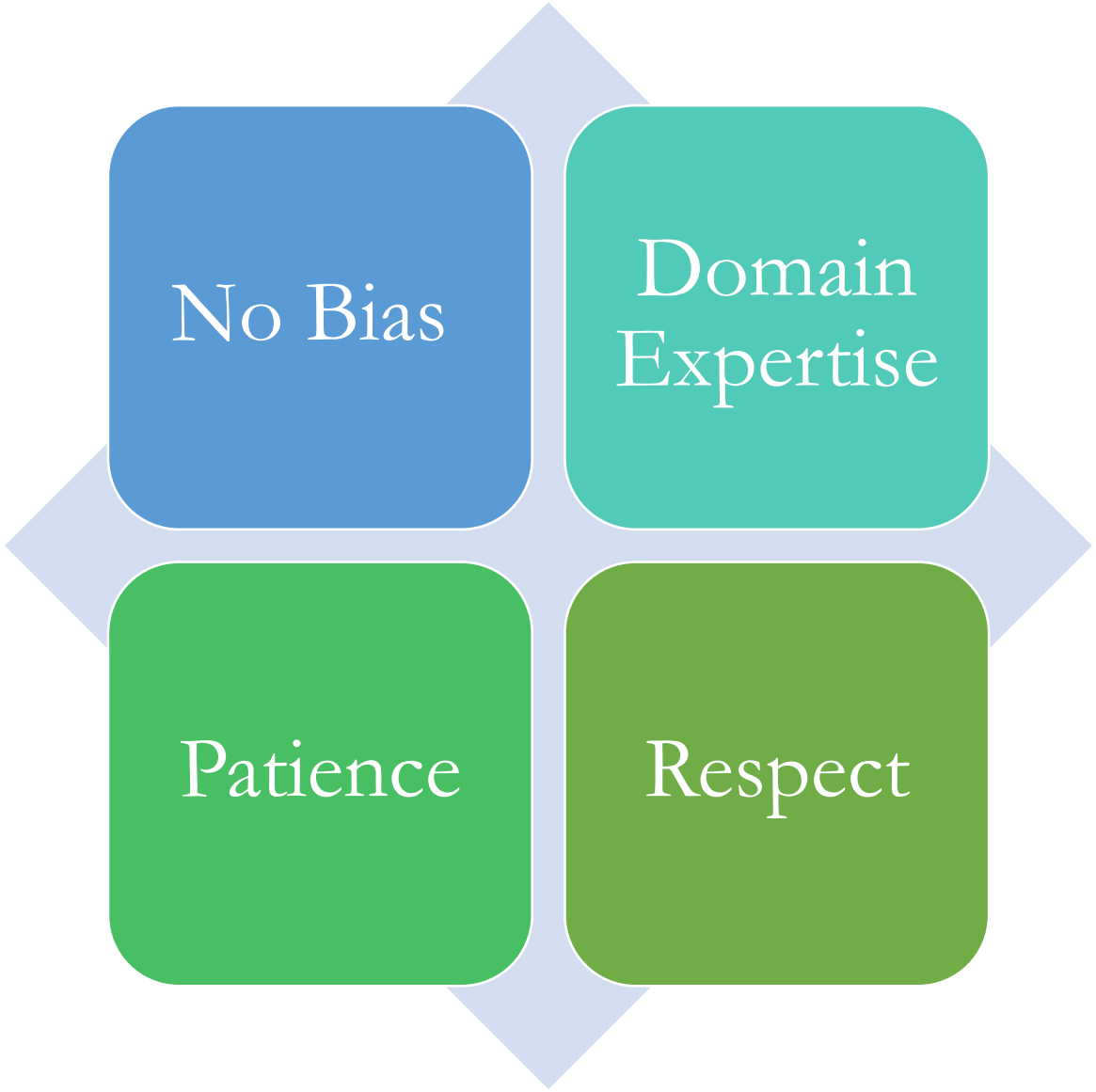
How to Prepare Yourself and Your Client for Mediation?

- Define client's interest and position.
- Identify desirable range of outcomes.
- Ensure client has realistic expectations about the possible outcome Be familiar with key legal issues.
- Know and thoroughly investigate key facts.



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What Makes a Successful Mediator?



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Mediation Clause Language



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Sample Language

- **<u>This arbitration clause may be inserted into Cyber-Insurance Policies</u>**
- **<u>It provides for arbitration and/or mediation at the election of the policyholder</u>**

- **<u>Dispute Resolution:</u>**
- Any controversy, claim or dispute arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall, at the sole option of the Policyholder, be determined by arbitration in _____(venue)_____, in accordance with the laws of the State of _____ for agreements made in and to be performed in that state The arbitration shall be conducted by a panel of three neutral arbitrators who shall be selected in accordance with the JAMS Comprehensive Arbitration Rules and Procedures. The arbitration shall be administered by JAMS. The Award shall be in writing and shall specify the factual and legal bases for the Award. Judgment on the Award may be entered in any court having jurisdiction.
- <u>Allocation of Fees and Costs</u>. The arbitrators shall, in the Award, allocate all of the costs of the arbitration, including the fees of the arbitrators and the reasonable attorneys' fees and expenses of the prevailing party, against the party who did not prevail.
- <u>Mediation</u>: The parties shall, at the sole option of the Policyholder, participate in a mediation prior to commencing an arbitration.

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Case Examples



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Pacific Gas & Electric

- June 18, 2019 – A group of nine counties and cities in California announced that they and PG&E had accepted a mediator's proposal of $415 million to resolve the collective cities and counties' North Bay Fires claims.
- PG&E had filed for Chapter 11 bankruptcy on January 14, 2019, in response to financial challenges arising out of a series of catastrophic wildfires that occurred in Northern California in 2017 and 2018, which were blamed in part on electrical equipment owned and operated by PG&E.
- The collective amount of $415 million will be allocated among each of the nine public entities in an allocation process.



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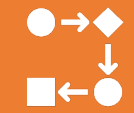
National Football League

- In 2013, a court-appointed mediator announced the NFL had reached a tentative $765 million settlement over concussion-related brain injuries with more than 4,500 retired players.
- Layn R. Phillips, a retired federal judge, led two months of mediation between the league and its players in an effort to avoid a lengthy and costly series of trials.
- Thousands of players had sought class certification from Judge Anita Brody of the Eastern District of Pennsylvania, where the multidistrict litigation was consolidated. But the NFL argued that the claims had to be arbitrated under the terms of its collective bargaining agreement with players. In July, Brody ordered the parties to explore the possibility of a compromise and said she would put off ruling on the NFL's motion to dismiss the suit until September.
- The settlement will cover all players or their surviving family members who have retired as of the date when Brody grants preliminary approval to the agreement. Crucially, however, the NFL will admit no liability that the plaintiffs' injuries were caused by playing football. Players alleged that the NFL had concealed from them the risk of permanent brain damage.



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Key Takeaways



Consider what would be the best process.



Be prepared for the mediation; identify the factual, legal and non-legal issues that will need to be resolved.



Sufficiently prepare your client; including any weaknesses of their case and the potential risks involved in proceeding to a trial.



Be prepared to listen and amend your position, where appropriate.

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Questions?

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Daniel Garrie is the Co-Founder of Law & Forensics LLC, Head of Computer Forensics and Cyber Security Practice Groups and has been a dominant voice in the computer forensic and cybersecurity space for over 20 years. Prior to Daniel's legal career, he successfully built and sold several technology start-up companies. Since co-founding Law & Forensics LLC in 2008, Daniel has built it into one of the leading boutique cybersecurity forensic engineering firms in the industry. Daniel has both a Bachelor's and a Master's Degree in computer science from Brandeis University, as well as a J.D. degree from Rutgers Law School. Daniel has led forensic teams in some of the most visible and sensitive cyber incidents in the United States.

Daniel regularly testifies as an e-discovery, cybersecurity and computer forensic expert witness, authoring forensic expert reports on multi-million-dollar disputes. His ability to perform complex investigations and effectively communicate the results to a jury has made him one of the most sought-after experts in the country. His testimony has been pivotal in a number of cases. Since 2008, Daniel has served as a Neutral and Special Master and in 2016, he joined JAMS as one of the organization's youngest Neutrals. At JAMS, Daniel serves as an Arbitrator, Forensic Neutral, and technical Special Master with a focus on cybersecurity, cyrptocurrency, and complex software and technology related disputes.

Daniel is well-published in the cybersecurity space, Editor-in-Chief of the Journal of Law & Cyberwarfare, author of more than 200 articles and books including, "Understanding Software, the Internet, Mobile Computing, and the Cloud. A guide for Judges", published by the Federal Judicial Center. He has been recognized by several United States Supreme Court Justices for his legal scholarship and is a trusted source and a thought leader for cybersecurity articles and opinions, being cited over 500 times to date.

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Michael brings decades of experience in successfully handling disputes and litigation in an extraordinarily diverse array of industries and businesses. His peers in the legal community describe Michael as the consummate trial lawyer, and he approaches every trial as an opportunity tell his client's story, in order to win.

In an era of "specialization" in the legal profession, Michael has been fortunate to maintain a trial, litigation and dispute practice that emphasizes achieving great results for clients in areas as varied as real estate acquisition and development, intellectual property/technology, energy, pharmaceuticals/drug development, securities, healthcare, environmental, consumer products, finance, apparel, and others. Michael excels at guiding clients through the perilous waters of disputes and conflicts in virtually any type of business dispute, and in being expertly skilled in helping clients achieve great results in settlement all the way through trial, if required.

Michael founded the firm's Litigation Practice in 2014 and chairs that practice, and earlier in his career, following graduation with honors from Columbia college and thereafter from University of California Berkeley School of Law (Boalt Hall), he was blessed with extensive on-the-job training from several of the nation's leading trial lawyers, with multiple opportunities to hone his litigation and trial skills. His creativity, persistence and work ethic led him to partnership at a leading Los Angeles litigation boutique at a young age and subsequently to a prominent partnership position at an international Am Law 100 law firm.

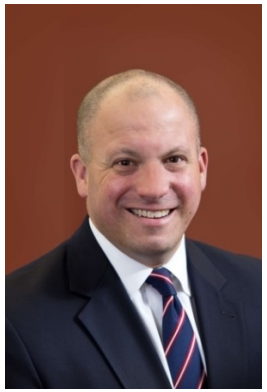
Michael has been recognized as a leading trial lawyer by his peers and regularly featured in the press for some of his significant victories on behalf of clients. He is a past president of the Los Angeles Chapter of the association of business trial lawyers. Michael's trial skills and courtroom success resulted in his being named to the "Top 100 Lawyers" in California list, published by the Daily Journal newspaper chain. For years he has consistently been named to "Best Lawyers in America" and "Super Lawyers".



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Hon. Gregory M. Sleet (Ret.) joins JAMS after serving 20 years on the bench of the United States District Court for the District of Delaware, including seven years as chief judge. Judge Sleet presided over 6,400 civil cases, including 2,002 patent cases, and wrote more than 1,200 opinions. He presided over 151 trials, including 74 patent trials (40 bench trials and 34 jury trials). Before taking the federal bench in 1998, Judge Sleet acquired varied experience in civil and criminal litigation and corporate legal work. He served as a United States Attorney for the District of Delaware from 1994-1998. He served as in-house counsel in the legal department of Hercules Incorporated (1992–1994) and as deputy attorney general for the State of Delaware (1990–1992). Prior to that, he practiced law in Philadelphia for 14 years, six of those as an assistant public defender with the Defender Association of Philadelphia.

Judge Sleet gained deep experience in a wide range of commercial cases during his tenure on the district court. He is especially known for his expertise in patent litigation, covering a range of industries, including medical devices, biotech/pharmaceuticals, consumer products, computer hardware/electronics, software, industrial/construction and chemicals. He is a sought-after speaker on patent litigation, participating on panels at RPX, the Rocky Mountain Intellectual Property and Technology Institute, the Sedona Conference, the USC Gould School of Law, the New York Intellectual Property Law Association's (NYIPLA) symposium on patent litigation, the Practising Law Institute and many others. Beginning in 2006-2007, Judge Sleet served as an adjunct professor, teaching patent litigation, at Rutgers Law School, Widener University School of Law and, most recently, Duke University School of Law.



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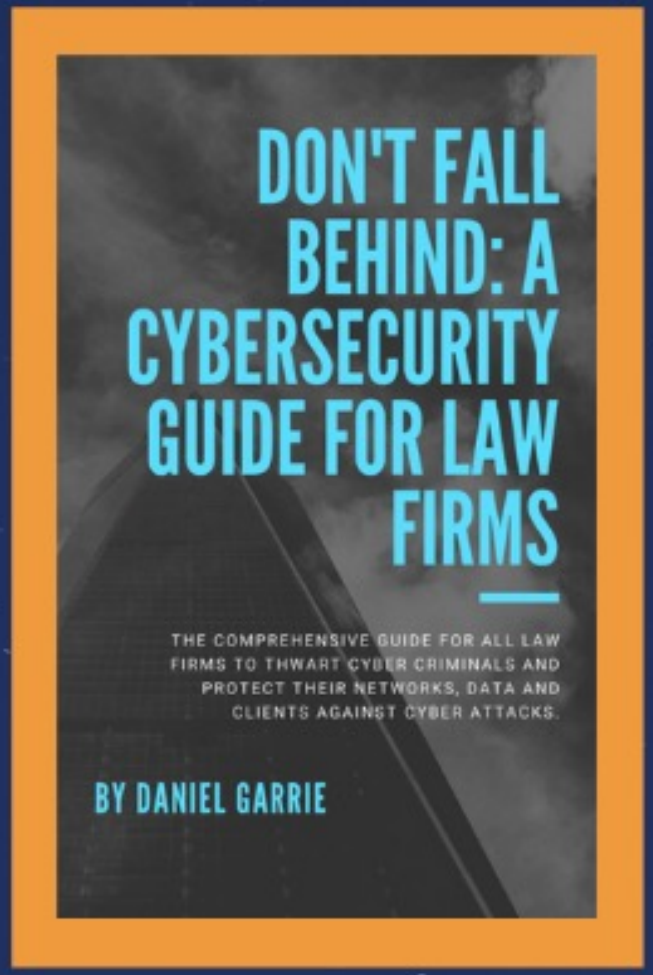
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Daniel K. Gelb is a partner at Gelb & Gelb LLP. He is a member of the bars of the Commonwealth of Massachusetts, the United States District Court for the District of Massachusetts, the United States Court of Appeals for the First Circuit and the State of New York. He graduated from Tufts University (B.A. in English), Boston College Law School (J.D.) and Boston College Carroll Graduate School of Management (M.B.A.). Prior to joining Gelb & Gelb LLP, Mr. Gelb was an Assistant District Attorney with the Norfolk County District Attorney's Office in Massachusetts.

Areas of Practice

Mr. Gelb practices at the state and federal levels in the areas of general and white-collar criminal defense, complex civil litigation, arbitration, regulatory proceedings, and student misconduct defense.

A CYBERSECURITY GUIDE FOR LAW FIRMS



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Alternative Dispute Resolution: Mediation, Arbitration, and Appraisal

Harris Bricken

USA | February 3 2022

Over the years, "Alternative Dispute Resolution" (ADR) has become more and more prevelant in both contract drafting as well as litigation. Far from being an "alternative," most disputes at some point will involve some degree of ADR, whether required by contract, by the courts, or driven by the costs of litigation. Despite the name "alternative," ADR is very much a key component of the litigation battlefield, and the conduct and outcome of ADR can shape the course of a dispute that ultimately winds up in court.

Even sophisticated businesspeople often fail to fully understand the ADR process and how it relates to litigation. This blog post is intended to explain ADR by outlining the three prevalent forums for ADR: mediation, arbitration, and appraisal, and how they relate to disputes.

Mediation

Though often thought of as an informal process undertaken by parties to a dispute in lieu of litigating, **mediation** has increasingly become a formalized process that plays a key role even in cases undergoing active litigation. Increasingly, courts in many states and particularly in the federal system, at both the trial court and appellate levels, require the parties to participate in **mediation** as part of the litigation process, including potentially engaging through a court-appointed **mediation** department. Additionally, many commercial contracts which contain mandatory arbitration clauses may require the parties to attempt **mediation** before commencing arbitration. However, even where required by court orders or rules, or by the terms of a contract, **mediation** offers the parties the advantage of maintaining the most control over the process and its structure.

In mediation, the parties agree to the selection and appointment of a neutral mediator, and most often split the mediator's fee between them. Often, mediators in many jurisdictions are retired judges or experienced litigation attorneys. In disputes involving complex or specialized areas of law or business, the parties may select a mediator who is known to have particular experience and expertise in the area, and who can bring an informed perspective to the dispute and the issues involved. While **mediation** is strictly confidential, and what is revealed to the mediator cannot be disclosed or used in court, a well-chosen mediator will be able to give a realistic and informed perspective, where necessary, as to how the courts or other relevant forums are likely to view and address particular issues and claims. Additionally, the involvement of a respected mediator is often looked upon favorably by courts.

The ideal goal of a **mediation** will usually be a settlement agreed to between the parties, though even where a complete settlement is not reached, **mediation** often provides an early opportunity, sometimes the first opportunity, for the parties to set forth their positions as well as hear out the positions of the opposing side. **Mediation** also may allow resolution of particular issues while reserving other issues for further litigation or may allow the parties to get an idea of the potential value of their dispute in order to determine whether the case is worth further litigation and expense. Even where a settlement is not immediately reached, **mediation** may be the first step in beginning

productive settlement negotiations, and a professional mediator will often offer their assistance in follow up sessions, calls, or other communications between the parties, which might allow a later breakthrough in negotiations.

Arbitration

In contrast to mediation, which is a less-formal, party-driven process in which the parties are not required to reach a resolution, arbitration is a more formal process in which the end result will normally be a binding decision. The arbitrator has the power to hear witness testimony under oath, examine evidence, issue orders and rulings while the proceedings are ongoing, and make final factual and legal determinations, typically called arbitration awards, which are binding on the parties, and which can be confirmed by a court and enforced as a judgment.

Most often, arbitration is provided for by the terms of a contract, and many form contracts used in consumer and commercial transactions contain mandatory arbitration clauses (although there has been a recent trend in several industries towards removing arbitration clauses). Several states, including Washington and Oregon, also have laws providing for mandatory arbitration of disputes originally filed as cases in their court systems that fall under a certain monetary value. Typically, in a court-mandated arbitration system, either party can elect to remove the case to mandatory arbitration.

At the conclusion of court mandatory arbitration, either party has the right to appeal the outcome for reconsideration de novo as a regular court case, though the appealing party is liable for the other side's litigation costs if they fail to achieve a better outcome than was reached in arbitration. In contrast to court-mandated arbitration however, a contractually mandated arbitration award may be very difficult to challenge, unless there is alleged irregularity or misconduct in the arbitration proceedings.

Most arbitrations follow rules established or inspired by the American Arbitration Association, which has multiple published sets of rules for arbitration of disputes in various subject-matter areas (e.g., commercial, consumer, construction, employment, and international disputes). Typically, each side pays an arbitration fee at the outset of the process. The parties may mutually agree to have the case heard by a particular arbitrator (particularly if the dispute involves unique or complex issues calling for an arbitrator with subject-matter experience). Otherwise, most often, a list of five to ten potential arbitrators, known as a "strike list," is provided to the parties, who each have a limited number of challenges (strikes) to the names on the list.

An arbitrator is then chosen at random from the remaining names on the list. Arbitrators typically have broad discretion to control the proceedings, with a stated goal of achieving a "fair, efficient, and economical resolution" of the dispute, including making rules for disclosures and discovery of information, setting hearings, and considering evidence (usually without being bound by typical rules of evidence as would apply in court). Arbitrations nonetheless usually otherwise proceed on a similar course to court litigation, with a filing of complaints, answers, and counterclaims, an exchange of information and/or authorized discovery, dispositive motions (including summary judgment), and one or more hearings before the arbitrator at which witnesses may be examined and evidence may be exhibited.

One variation on both **mediation** and arbitration is sometimes referred to as mediation-arbitration, or "med-arb." In this case, the parties agree to **mediation** and, if the dispute is not resolved, agree that the mediator may then serve as an arbitrator over the dispute. The combination of these roles allows the parties to retain the advantages of each type of process: the control over the process that **mediation** provides, with the certainty and finality of arbitration.

Appraisal

The third common form of ADR, though the one least encountered and least well-understood, is appraisal. Appraisal is used when the dispute involves the monetary amount of potential recoverable claims or damages, rather than the establishment of liability, though an appraisal could be conducted to determine potential damages, with liability being reserved for determination by other proceedings (i.e., litigation). As with arbitration, appraisal is typically provided for by contract, is a binding process, may be invoked by either party, and is most commonly encountered in property insurance claims.

Appraisal typically proceeds by each side selecting and hiring a professional appraiser (who may be retained on a contingency basis in exchange for a percentage of the ultimate appraisal award), who (as with mediators and arbitrators) preferably will have relevant subject-matter experience in the property or claim to be appraised. A third appraiser, known as an umpire, is selected either by agreement of each side's appraisers or by court order (if the dispute has reached the stage of litigation). The appraisers will evaluate the claim(s), loss, or dispute, conduct inspections, obtain quotes, write estimates, engage third-party experts where necessary, and will each present their respective appraisals of the claim or portions of the claim. Agreement of any two appraisers (either each side's retained appraisers or one appraiser plus the umpire) is sufficient to enter a binding appraisal award as to the claim.

When facing a dispute in which ADR may play a role, it's important to consult experienced litigation counsel who can guide you through the process in a cost-effective way that preserves the goal of ADR, namely, to resolve disputes efficiently and economically, while still protecting your interests and options through the process.

Harris Bricken - Tom Oster

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Avoiding tragedy in mediation

Peterson ADR

USA May 14 2021

Two parties, both alike in dignity,

In fair mediation, where we lay our scene,

From ancient grudge break to new mutiny,

Where civil claims makes civil hands unclean.

Like the opening monologues of Shakespeare, opening statements in **mediation** set the tone for the discussions to come and often foreshadow the outcome. Unfortunately, many go from a comedy of errors to outright tragedy due to a lack of planning, foresight, and failure to utilize the correct type of advocacy necessary in mediation. Flawed opening statements result in heated emotions, frustrated parties, and bring mayhem into the mediation.

The following is a roadmap to successful opening statements. **Mediation** openings should be as thought out and well-planned as opening statements in the trial, but without aggressive, trial-level advocacy. Use this opportunity a bit more like a sales pitch in terms of tone and style is not a bad idea. The goal is to build rapport with the opposing party and acknowledge the potential validity of the claims and defenses presented. The change in tone and approach does not mean advocacy disappears; it is made persuasive instead of argumentative.

To do or not to do an opening? That is the first question. Opening statements should not sling mud and arrows at opposing parties but actively address resolution of the case. The most frequent mistake in **mediation** openings is to forget to change costume from a zealous advocate to a negotiator. Aggressive openings can alienate opposing parties and increase resistance to settlement and extend the **mediation** timeline as the mediator spend valuable time pouring oil over troubled waters.

Estimate the amount of time needed for an opening statement. Remember that the other parties may also wish to do an opening, multiply the planned time by the number of parties, then revise as appropriate. When to do the opening should also be contemplated. It can start the day, be done the day before, or even once the **mediation** has commenced.

Just because one party has decided on an opening does not mean everyone has to do one. Sometimes the best opening is just a simple expression of thanks for everyone's time and an affirmation of an intent to settle.

A significant factor for success is one of the most overlooked: include the mediator in the planning. Mediators can help refine the presentation and warn of potential pitfalls. It is not uncommon for frustrated parties to throw quotes from an opening back when they feel promises made are not kept, especially any variations on "we are here in good faith." **

Know your audience. Openings are, in essence, a sales pitch tailored to the target. There is a world of difference between an individual who has suffered a catastrophic personal injury and twenty subcontractors on a construction dispute. Consider the sophistication and experience of the litigants, and as they are the ultimate decision-maker, treat

them as such. Use prior settlement discussions as a foundation to build upon during the opening.

Do not attack the opposing party or opposing counsel. Be respectful. As basic as this sounds, if the litigation process has been stressful or high conflict, the temptation to do so will be there. The moment the attack happens, any goodwill or intent to settle will be gone. It may be resurrected, but that moment will not be forgotten during the mediation. If tensions are that high, think about forgoing any opening statements.

Prepare your clients. Make sure they understand what **mediation** is, what it is not, and the process. If they are uncomfortable with or new to mediation, have a pre-mediation conference with the mediator to discuss what **mediation** is and its role in the litigation process. The mediator can explain their role and begin to build trust.

Let your clients know they will hear things they do not like and, just like at trial, should not react or respond negatively. Pads of paper to take down notes are an effective way to channel reactions. With online mediations, everyone's faces are front and center to the camera. Sighing, eye-rolling, or other similar responses will be readily apparent. Ensure your clients are on mute during the presentation.

Perhaps most important, do not let this moment be the first time your client hears their case may fail. Brief clients before **mediation** on their matter and also on the claims and defenses of opposing parties. Cover what the results would be on their best and worst days in court. Talk about what an average day is as well. Include what would happen if the **mediation** is unsuccessful in terms of the next steps, especially if significant time or money will need to be invested immediately. Even if not completely happy, they should understand the concept that **mediation** means some compromises.

Discuss with your client COVID's impact on the legal system, from delays in trial to the changes in how trials are conducted. COVID is a likely subtopic in an opening statement, especially by the defense, who may want to leverage the time value of money. Contextualizing the time issues for **mediation** will help clients understand later offers.

The best openings educate not only the opposing party but also the mediator. Expert witnesses can play a role here either in preparation or in presentation. In a tire defect case, the expert witness for the defense gave a master class on how tires work. Presented without reference to the current underlying litigation until the very last few minutes, it was powerful and felt like a neutral evaluation. The discussion started with, "here's what happens when you have four of the same brand, age, and type of tires on a car." It then moved on to the impact of age differences, brand differences, if one or more tires are bald, or purchased used. The defense represented a manufacturer of a tire that failed and was the cause of the accident. However, the tire was purchased used and was bald at the time of the accident. The time invested in explaining the mechanical and engineering factors in tire manufacturing and use later supported the defense's settlement offers.

Mediation openings are also a first run for all parties on how their case may present at trial. Even though discovery has been propounded and gone over with a fine-toothed comb, what is important to the other party in presenting and proving their case is not always clear. How a document is interpreted or the weight given to it is not easy to infer absent context. A **mediation** opening will create context and may show unknown flaws in the case. In an employment mediation, a single checkbox on an annual review report was the difference between a slam-dunk age discrimination claim and a much harder argument at trial. The checkbox's import was not understood until it was presented in context with the rest of the claim.

Know the value and weaknesses of the case being presented. Be the right kind of advocate for the case and venue.

Ensure the message is tailored to the audience. Test the opening on the mediator for clarity and tone. Opening sessions in **mediation** are a foundation to present the case while potentially bringing it to resolution, don't pass up the opportunity.

If we mediators have offended,

Think but this, and all is mended,

That you have caucus'd here

While these proposals did appear.

Peterson ADR - Denise Peterson

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Choosing an Effective Mediator

Carolyn Tan

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> Mediation may be the last time that you and your client will be in control of your case before it moves toward trial and into the jury's hands.
>
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Although mediation is often underrated, it is a crucial—often mandatory—step in a wide variety of cases, including commercial litigation, entertainment law, family law, and intellectual property law. Consider this: it may be the last time that you and your client will be in control of your case before it moves toward trial and into the jury's hands.

The process starts with the selection of the mediator. Do not be fooled that randomly picking a mediator, even one from a familiar institution, will

ensure a speedy settlement. As with the variety of practice areas and approaches to work among attorneys, there are many ways mediators vary: some may be more defense (or plaintiff) oriented; some invest more time in their cases than others, both in preparation and follow-up; some mediators may be more skilled at handling a group of sophisticated litigants, while others may be more effective in explaining the process to those unfamiliar with litigation; and there are even those mediators who do not show adequate respect for young attorneys. It is imperative to choose wisely from the beginning.

The first thing that will happen is that both sides will propose a list of mediators. So how do you decide whom to put on your list? Here are some qualities to look for in your neutral.

Prepared

Your mediator needs to be able to understand the law, facts, and potential damages before anyone actually shows up to the session. A good neutral will have read both sides' briefs and will know a basic background of the case before ever meeting the clients. You can help the mediator prepare by submitting a well-thought-out brief that includes a summary of the facts, applicable law, points of contention, damages, and any prior settlement negotiations.

Personable

Your mediator should also be able to connect with you and your client, as well as the other side. It takes a certain type of person to be able to move back and forth between two adversarial parties, catering to each one's demands. The most enjoyable mediators to work with are those who bring empathy and honesty to the table, yet still exhibit charisma and humor when appropriate. They should treat the litigants with respect and make an attempt to learn about their claims and defenses. They should also treat the attorneys with respect, despite their age or experience level. As a young

attorney, you may feel that you have a disadvantage. The mediator may assume that it is a low-value case because the partner did not show up. However, your job is to demonstrate your professionalism and to build rapport with the mediator.

Persuasive

At the end of the day, a mediator must be persuasive. Remember, she is batting for both sides, so although she may appear to be on your team while talking to you, she is also doing the same when she goes back to the other room. It is her job to get both sides to move from their positions until a settlement happens. Be open to her suggestions and evaluation of your case. Of course, if you find that she is severely undervaluing a legitimate claim or defense and attempting to strong-arm you into a fast settlement, it is time to find a new mediator.

Patient

Unfortunately, mediations can be long and drawn out. They are usually set for at least half a day, and sometimes multiple days for more complex matters. The back-and-forth numbers dance seems like a waste of time, but it is a strategic, psychological game that must be played. A good neutral will be patient, yet efficient. He will know when to call it a day, but he will also know when to keep pushing, and will recognize and take advantage of any glimmer of hope for a resolution. You may also want to speak to the mediator in private, outside the presence of your client. You should tell the mediator this from the outset and he should have no problem speaking to you in a caucus away from your client, as well as reconvening with you and your client after any such discussion.

Proactive

A mediator cannot just sit on the sidelines running numbers back and forth. You are paying her to negotiate on your behalf, which means advocating for

your arguments to the other side. This job requires her to be proactive, not only during the session but also after if the case does not settle on that day. A good mediator will not give up just because the session is over. She will make extra calls or emails to both sides to see if there is anything else she can do to facilitate settlement. Perhaps one side has another offer to make after having a good night's sleep. If the mediator feels it will be helpful, she may even suggest a second session.

Eventually, you will find a set of mediators you enjoy working with. If opposing counsel is not amenable to any of your suggestions, consider their proposals. If you are unfamiliar with their list, call other attorneys who may be able to share their experience. Do not insist on a mediator, however, with whom the other side feels uncomfortable. It will be more effective in the long run to use a mediator who both parties respect and will listen to.

As a final note, the best way to observe different mediators' styles before doing your own mediation is to shadow a more senior attorney. The pressure of the actual negotiation will be off you, but you will still be able to get to know the mediators along the way.

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Expert Analysis

Don't Let Lies Infiltrate The Mediation Process

By **Jennifer Gibbs and Amanda Rodriguez**

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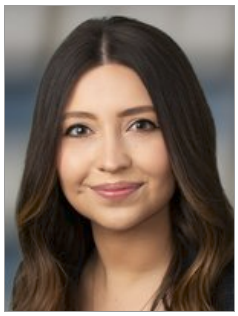
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Law360 (January 25, 2021, 12:40 PM EST) -- Mediation is quickly becoming an even more important form of adjudication as courts have been significantly impacted by the COVID-19 pandemic.



Jennifer Gibbs



Amanda Rodriguez

With the second surge in reported cases, courts across the nation have been forced to further postpone jury trials until at least March or April. Thus, mediation will be a more attractive option for parties looking to quickly resolve disputes and for courts to address overflowing dockets.[1]

With this rise in mediation comes the increased risk that participants will engage in dishonest behavior to obtain a favorable resolution. The latitude to craft a narrative without meaningful checks on the truth creates opportunities for lies to infiltrate the mediation process.

The generally accepted rule that statements made in the context of mediation are protected only contributes to these incentives to stretch the truth.

However, counsel should be aware that they do not have carte blanche to create a fabricated storyline without consequence. Although lying in mediation may be a common practice, it can be considered a breach of ethical rules, landing the lawyer, and perhaps the mediator, in hot water.

Rule 401

Despite the prevalence of mediation in the current dispute resolution landscape, the ethical rules surrounding mediation are somewhat unclear. In April 2006, the American Bar Association formally extended Model Rule 4.1 to mediations.[2]

Model Rule 4.1 provides that an attorney shall not knowingly make a "false statement of material fact or law" to another or fail to disclose a material fact when disclosure is necessary to avoid assisting in the completion of a crime or fraud.

This extension by the ABA made it clear that lawyers must uphold ethical rules when participating in mediation, but it did not provide clear guidelines for what is — and more importantly, what is not — acceptable behavior in mediation.

Significantly, the ABA gives little guidance as to what qualifies as a "material fact." Instead, whether a statement constitutes a material fact depends on the circumstances.[3]

Thus, it is important for the mediating lawyer to consider factors like past relationships with the parties, the sophistication of the parties, the phrasing of the statement, and the plausibility of statements forwarded in mediation.[4]

For example, in the personal injury case of Statewide Grievance Committee v. Gillis, a Connecticut state court found in 2004 that a lawyer did not violate ethical rules in failing to disclose the client's prior accident history in settlement negotiations because he provided enough information to the insurance adjusters to put them on notice to make further inquiries.[5]

It is widely accepted, however, that puffery and opinions are not considered statements of material fact in the mediation context.[6] While a certain level of puffery is expected in mediation, lawyers must be careful not to mislead or allow a mediator to forward to the other side an incorrect statement that could be deemed material, or the lawyer could face allegations of ethical violations.[7]

Further, if lawyer-mediators engage in unethical behavior, they may also face consequences for ethical violations.[8] The ABA Model Standards of Conduct for Mediators Standard VI explicitly states that a mediator "shall not knowingly misrepresent any material fact or circumstance in the course of a mediation."

Critics have charged that this rule is as vague as Model Rule 4.1, which results in the need for mediators to take similar care to ensure that they do not convey material misrepresentations to parties.[9]

Settlement Privilege and Confidentiality in Mediation

Where communications made in the mediation context are to remain confidential, lawyers may be tempted to advance false statements to reach a favorable agreement for their client.

Federal Rule of Evidence 408 provides that evidence of conduct or statements made in compromise negotiations are not admissible, but this evidence can be admitted for other purposes, such as to prove bias or prejudice.[10] Some courts have recognized a so-called settlement privilege by expanding the scope of Rule 408.[11]

The U.S. Court of Appeals for the Sixth Circuit, for example, held in a 2003 opinion in Goodyear Tire & Rubber Co. v. Chiles Power Supply Inc. that public policy supported a settlement privilege because it fosters more effective negotiations, as parties do not have to fear disclosure of their discussions to third parties.[12]

Despite this move toward settlement privilege, it is important to note that not all jurisdictions have accepted such an all-encompassing rule of confidentiality. For example, in Alclair White v. Chevron Phillips Chemical Co. LP, evidence related to lewd comments and questionable gestures toward opposing counsel in a mediation were the subject of post-mediation complaints brought last year against an attorney.[13]

When these actions were memorialized in subsequent court documents, questions were raised as to whether this conduct was cloaked in confidentially. Ultimately, the judge hearing the complaints, U.S. District Judge Lee Rosenthal of the U.S. District Court for the Southern District of Texas, did not punish the attorney, but his actions were the basis of numerous articles.[14]

Lawyers involved in settlement negotiations must pay particular attention not only to ethical guidelines but also to whether the procedural and evidentiary rules of the jurisdiction would find certain statements made during negotiations to be protected.

Additionally, every state has enacted some rule or statute to protect mediation communications from disclosure. These state-based rules have led to different levels of protection applicable to mediation.

For example, California courts have held that there may be no discovery or introduction of any evidence of communications between a client and his or her attorney before or after mediation, even in a malpractice case.[15]

New Jersey courts have also found that state laws provide broad privilege for mediation communications, but this privilege is not absolute as there are recognized exceptions to the privilege, such as waiver and a signed-writing exception for the settlement agreement.[16]

On the other hand, Oregon courts have found that mediation communications are only privileged when a mediator is involved such that other communications may be introduced by a client who wishes to waive attorney-client privilege.[17]

While these varying rules and regulations are aimed at fostering settlement via mediation by increasing confidentiality, they also require a lawyer to pay particular attention to the types of statements they make while mediating to avoid potential ethical violations.

Outside of these jurisdictional rules, mediating parties should also pay close attention to what types of confidentiality provisions their alternative dispute resolution provider may require.[18] Similarly, a party may be bound to the terms of a confidentiality agreement entered into with the opposing party.[19]

For example, in Facebook v. Pacific Northwest Software Inc.,[20] the parties signed a short-term sheet at the close of mediation containing a confidentiality provision. In the subsequent dispute regarding whether the settlement had been procured by fraud, the U.S. Court of Appeals for the Ninth Circuit in 2011 held that the term was enforceable and barred the defendants from introducing any evidence of what was said during mediation.

Misrepresentation or Puffery?

Lawyers may find it useful to look to court decisions to determine what types of statements may fall into the puffery category and what may cross an ethical line.

For example, although seemingly obvious, courts have found that lying about, or failing to mention, the death of a client while in settlement negotiations is a clear violation of ethical rules.[21]

In addition, consider Siegel v. Williams, an early 2000s malpractice case against a lawyer in Indiana state court. There, the defendant lawyer, who was the attorney of record in his own case, told opposing counsel that he would settle for a specific amount and claimed that he lost his money in a recent divorce and would have to declare bankruptcy if the plaintiffs were awarded anything above that amount.[22]

Based on this representation, the plaintiffs settled for this amount.[23] A couple of years later, the attorney claimed that he could have paid a judgment far above that amount, which led the Indiana Court of Appeals to find that he engaged in constructive fraud, and an additional $100,000 in damages awarded to the plaintiffs.[24]

Courts have found, however, that there may be a difference between the types of disclosure that are necessary depending on whether the parties are in negotiation or have reached a settlement.

For example, in a personal injury case from the 1960s, Spaulding v. Zimmerman, a defendant's doctor performed an exam on the plaintiff and learned that the minor plaintiff had an aneurysm that the plaintiff's doctor had not found.[25] This report was made known to the defendant's counsel prior to negotiations.[26] The day after trial was called, the parties settled the case and the court approved it without knowledge of the aneurysm.[27]

Two years later, the plaintiff discovered the aneurysm and brought forth an action for additional damages against the defendant.[28] The Minnesota Supreme Court found that while negotiating, the defendant did not have a duty to disclose this knowledge, but they did have to disclose it once the parties reached a settlement.[29]

While the lawyer was not found to have violated any ethical rules, by not disclosing the plaintiff's condition during settlement, the settlement agreement was ultimately still set aside for failure to fully contemplate the injuries.[30]

Pursuant to Model Rule 4.1, the Montana Supreme Court found in a 2007 ruling in In re: Potts that a lawyer's failure to correct another party's mistaken understanding of the total value of an estate in a will contest was a violation of this ethical rule.[31]

In another case, however, the U.S. District Court for the Southern District of Florida in a 2019 ruling in Alexsam Inc. v. WildCard Systems Inc. found that a plaintiff's counsel's actions did not rise to the level of being sanctionable when the attorney failed to disclose that the plaintiff had filed a complaint in court that was unknown to defendant while at mediation.[32]

In failing to find a violation, the court held that Model Rule 4.1 does not impose an affirmative duty to inform an opposing party of all relevant facts, such as the filing of the lawsuit.[33]

While not decisive on whether a lawyer violated Model Rule 4.1, the U.S. District Court for the District of Maryland in a 2002 ruling in Ausherman v. Bank of America Corp. found that there was a sufficient basis to refer a lawyer to a disciplinary committee when that lawyer admitted he lied in a settlement demand letter.[34]

The letter at issue stated that the lawyer could obtain the name of a "John Doe," who the attorney claimed was a kingpin in a scheme to obtain the plaintiffs' credit reports and disseminate them.[35] This information was offered to the defendant bank in exchange for a demanded sum.[36] Later, during his deposition, the lawyer admitted that he did not actually have a way to obtain the name of this alleged kingpin when he made that representation.[37]

Further, if there are material misrepresentations by either the lawyer or mediator made during a mediation process, as shown in the examples above, there is a risk that any settlement reached in the context of that mediation will be set aside as void.[38]

Conclusion

Although there is a generally accepted idea that settlement and mediation communications are entitled to confidentiality protections, each state's rules regarding confidentiality differ. Given this jurisdictional variation, and the fact that ethical rules have been extended to apply in the mediation context, lawyers should maintain integrity and take care in making statements asserted while mediating.

Lawyers should be mindful of not only their own statements asserted during mediation, but also those of the opponent and the mediator. And if a settlement is obtained on the basis of a material misrepresentation asserted during mediation, the settlement can be vacated, and the attorney asserting the misrepresentation can be found in violation of ethical rules.

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[1] For example, the City of Philadelphia requires Covid-19 related landlord/tenant disputes to participate in mediation prior to filing a court action. Eviction Diversion Program, City of Philadelphia, https://phlevictiondiversion.org/ (last visited Jan. 20, 2021).

[2] Am. Bar Ass'n Comm. On Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006).

[3] Stewart Edelstein, How to Make Sure Your Negotiation Statements Don't Cross the Ethical Line, The American Bar Association (July 27, 2017), https://www.americanbar.org/groups/litigation/committees/young-advocates/practice/2017/how-to-make-sure-your-negotiation-statements-dont-cross-the-ethical-line/.

[4] Id.

[5] Statewide Grievance Comm. v. Gillis, No. CV030479677S, 2004 WL 423905, at *13 (Conn. Super. Ct. Jan.

28, 2004).

[6] James K. L. Lawrence, Lying, Misrepresenting, Puffing and Bluffing: Legal, Ethical and Professional Standards for Negotiators and Mediation Advocates, 29 Ohio St. J. on Disp. Resol. 35, 38 (2014).

[7] See id.

[8] See Fran L. Tetunic, The Irony of Mediator As Problem Maker: Mediator Misconduct Setting Aside Mediated Agreements, 23 Harv. Negot. L. Rev. 177, 187 (2017).

[9] Andrea C. Yang, Ethics Codes for Mediator Conduct: Necessary but Still Insufficient, 22 Geo. J. Legal Ethics 1229, 1237 (2009).

[10] See Fed. R. Evid. 408.

[11] Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc. , 332 F.3d 976, 980 (6th Cir. 2003).

[12] Id.

[13] Michael E. McCabe, Jr., The Curious Case of the Twerking BigLaw Attorney, McCabe & Ali LLP, https://ipethicslaw.com/the-curious-case-of-the-twerking-biglaw-attorney/ (last visited Dec. 22, 2020).

[14] See id.; Kevin Stawicki, Chevron Defeats Bias Suit Marred by Butt-Shaking Allegation, Law 360 (July 31, 2020, 2:29 PM), https://www.law360.com/articles/1297176.

[15] Hon. Raymond T. Lyons (ret.), How Confidential Are Mediation Communications? 36-AUG Am. Bankr. Inst. J. 36, 36 (2017).

[16] Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C. , 215 N.J. 242, 256, 71 A.3d 888, 896-97 (2013).

[17] Alfieri v. Solomon , 358 Or. 383, 406, 365 P.3d 99, 112 (2015).

[18] Lyons, supra note 15, at 37.

[19] Id.

[20] 640 F.3d 1034 (9th Cir. 2011).

[21] Virzi v. Grand Truck Warehouse & Cold Storage Co. , 571 F. Supp. 507, 508 (E.D. Mich. 1983).

[22] Siegel v. Williams , 818 N.E.2d 510, 516 (Ind. Ct. App. 2004).

[23] Id.

[24] See id.

[25] Spaulding v. Zimmerman , 263 Minn. 346, 352, 116 N.W.2d 704, 709 (1962).

[26] Id. at 707-08.

[27] Id. at 708.

[28] Id.

[29] Id. at 709.

[30] Id. at 353-54.

[31] In re: Potts , 2007 MT 81, ¶ 20, 336 Mont. 517, 522, 158 P.3d 418, 421.

[32] Alexsam, Inc. v. WildCard Sys., Inc. , No. 15-CV-61736, 2019 WL 2245420, at *10 (S.D. Fla. Feb. 13, 2019).

[33] Id.

[34] Ausherman v. Bank of Am. Corp. , 212 F. Supp. 2d 435, 451 (D. Md. 2002).

[35] Id.

[36] Id.

[37] Id. at 450.

[38] Tetunic, supra note 8, at 200; Virzi, 571 F.Supp. at 508.

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ROLE OF ATTORNEYS IN MEDIATION PROCESS

Overview

A party who chooses to resolve a dispute through mediation may or may not be represented by a lawyer at any point in the process. At the option of the party, for example, a party may:

1. Be represented by a lawyer from the moment that party's first pleading is filed;

2. Enter the case unrepresented, and secure representation at some point later in the case prior to or during the mediation process;

3. Complete the mediation process and consult a lawyer only to review the terms of the mediated agreement; or

4. Complete the mediation process and enter an agreement without a lawyer's assistance.

The traditional role of the lawyer has been to represent the interests of his or her client, by advising the client regarding procedure and substantive law, counseling the client, and managing the legal process for the client. While the lawyer will continue to perform each of these traditional functions in the mediation process, the manner and the context in which those functions are performed will be different. The vital distinction is that mediation is a *non-adversarial* process, through which each party is encouraged to take responsibility for resolving the dispute.

For many lawyers, the threshold questions are whether they should attend the mediation session(s) at all, and if they do, what role they should take in the session(s).

Various Roles a Lawyer Might Assume in Mediation

Before Mediation

By assisting the party in making informed decisions about the mediation process before the process begins, the lawyer encourages the party to take responsibility for resolving the dispute, consistent with the principles of mediation.

The lawyer explains to the party the nature of the mediation process, what to expect during mediation, the relevant law governing the mediation process, and how the mediation process complements the court procedures. The lawyer helps the party make an informed choice of a mediator based upon such factors as the nature of the party's case, the background and experience of the mediator, and the potential fees involved. The lawyer may review with the party the listings and profile sheets for certified mediators contained in the Directory of Court Mediators.

Drafted Geetha Ravindra. Geetha can be reached at geetha.ravindra@yahoo.com.

The lawyer assists the party in determining whether timing is a factor in choosing mediation. For example, the lawyer may recommend mediation at the beginning of the case in order to explore settlement before positions become entrenched, or may recommend that mediation be deferred until completion of all or part of the discovery process.

The lawyer advises the party on the substantive law relevant to the case. This enables the party to understand the range of outcomes that are possible if the case is litigated and to formulate a range of acceptable outcomes for the mediation process. For example, in a personal injury case, the lawyer may advise the party on the range of outcomes regarding liability, the range of possibilities for a money judgment, and such options as structured settlements. Advice that helps the party understand that there may be more than one solution which meets that party's needs helps the party enter mediation willing to consider various options for settlement.

During Mediation

As before beginning the process, the lawyer continues to advise the party on the substantive law relevant to the case, helping the party understand what information might be important to share or to learn during the mediation, the options that might be available, the potential consequences of each option, and the possible outcomes to anticipate if agreement is not reached through mediation.

Throughout the mediation process the parties are encouraged to take responsibility for resolving the dispute. This responsibility includes participating actively in problem-solving discussions with the assistance of a trained neutral mediator. The lawyer's role is to assist the party in negotiating for himself or herself, bearing in mind the non-adversarial nature of mediation.

The lawyer guides the party in negotiating by encouraging the party to express thoughts and feelings, helping the party define interests, and helping the party gather necessary information, generate options, and examine consequences.

The lawyer can guide the party through settlement discussions whether the lawyer attends the mediation sessions or not. The lawyer may consult with and advise the party before and after the session(s). The lawyer might also advise the party of when it would be wise to request a break in mediation for the opportunity to consult the lawyer for additional information and advice. In some cases, the party and the lawyer may arrange for the lawyer to be available by telephone for consultation while the mediation is being conducted.

The lawyer manages the legal process for the party while mediation is being conducted, keeping the party informed of important dates, responding to and filing necessary pleadings, and conducting discovery.

Attendance at the Mediation Session(s)

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Statutory Authority

Va. Code § 8.01-576.5 provides that a lawyer for any party may be present during the mediation session(s). It does not, however, suggest what factors to consider in deciding whether the lawyer should attend the session(s), nor does it address the extent of participation by the lawyer which is appropriate during the session(s).

The choice of whether the lawyer attends the session(s), as well as the extent of participation by the lawyer, ultimately belongs to the party. The party makes his or her choice after discussion with the lawyer and consideration of the lawyer's advice. Because the success of the mediation process depends, among other things, upon each party making informed decisions in resolving the dispute, the lawyer's task at this stage is to enable the party to make an informed decision about these issues.

No Prejudice if Party Attends Without Lawyer

A party suffers no prejudice if he or she chooses to attend mediation without his or her lawyer present.

Dispute resolution proceedings are not on the record. Rules of evidence do not apply. Mediators do not make any findings of fact and do not impose any decisions upon the parties. While mediators may encourage and assist the parties in resolving their dispute, they are prohibited from compelling or coercing the parties into a settlement. Va. Code § 8.01-576.9. See also the Standards of Ethics and Professional Responsibility for Certified Mediators, Appendix B.

Mediators in Virginia make no reports to the court which could result in prejudice to a party. Va. Code § 8.01-576.9 provides that, in reporting the outcome of the dispute resolution proceeding to the referring court, the mediator shall indicate only the terms of any agreement reached or the fact that no agreement was reached. The mediator is prohibited from disclosing any information exchanged during the proceeding, as well as any observations regarding the conduct and demeanor of the parties and their lawyers.

Mediators must advise each party, in writing and at the commencement of mediation, that each has the opportunity to consult with an independent lawyer and is encouraged to do so. Va. Code §8.01-576.12. Even when the lawyer is not present at the mediation session(s), a party may consult with his or her lawyer before and after the mediation session(s), or by telephone during breaks in the mediation session(s). In addition, mediators are required to encourage each party to review any mediated agreement with his or her lawyer prior to signing it. Va. Code § 8.01-576.12.

Factors Affecting the Decision to Attend

Since nothing about the mediation process itself suggests that a lawyer *must* attend the mediation session(s), the decision depends primarily upon the party's needs within the

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context of the mediation process. While some people attempt to generalize the role of lawyers according to case type (e.g., "You need a lawyer in a personal injury mediation, but not in a domestic relations mediation."), it is the needs of the parties (such as the information, resources, and real and perceived power of each) that drive the decision to have a lawyer present in mediation, not the case type.

Because mediation is a cooperative problem-solving process in which the mediator facilitates communication between the parties, the fundamental consideration is whether the party is capable of participating effectively in the process without the lawyer's presence. This consideration encompasses two distinct levels of inquiry: whether a party suffers from any personal impediments to effective communication, and whether the nature of the relationship between the parties impedes effective communication.

If the party can participate effectively in the mediation process without his or her lawyer present, the lawyer need not attend the mediation. If circumstances are such that the party cannot participate effectively in the process without the presence of the lawyer, despite the guidance of the mediator, it may be in the party's best interests for his or her lawyer to attend the mediation session(s). The subsections which follow will illustrate this distinction.

Concerns with a Party's Ability to Communicate

Any significant impediment to a party's ability to communicate, to understand, and to make informed decisions should be considered in deciding whether it would be appropriate for the party's lawyer to accompany the party to the mediation session(s).

For example, mediation would be deemed inappropriate for a party who is drug or alcohol dependent and actively under the influence. The potential impact of such impediments is one of the reasons that parties are required to attend a dispute resolution evaluation session. If any such impediment is apparent, the neutral who conducts the dispute resolution evaluation session, or the mediator at a later point, may recommend that mediation is not an appropriate process in this case, or that mediation proceed only under certain conditions.

On occasion, a party's lawyer may have concerns about the party's ability to communicate, to understand, and to make informed decisions in the context of mediation, although the basis for these concerns is not so significant that the case is deemed inappropriate for mediation or subject to special conditions. For example, the party may become very easily flustered or have a very short attention span. In such cases, the lawyer should explore his or her concerns with the party, explaining the nature of mediation and probing the party's ability to communicate, understand, and make informed decisions on his or her own behalf.

If the party wishes to proceed with mediation, the party should seriously consider the option of having the lawyer accompany him or her. If the party prefers to attend mediation without the lawyer, the party and the lawyer should be reassured that the

Standards of Ethics and Professional Responsibility for Certified Mediators impose a continuing duty upon the mediator to assess the appropriateness of mediation and the ability of the party to participate effectively in the process.

Concerns About the Parties' Relationship

The second level of inquiry in determining whether the party can participate effectively in the mediation process without the presence of his or her lawyer focuses on the relationship between the parties. This inquiry can be framed as a "balance of power" question: does each party have reasonably comparable power in the relationship to engage effectively in the problem-solving process?

"Power" in the mediation context is the ability of one party to affect the outcome of the mediation process. When each party has a comparable real or perceived ability to control a range of outcomes for the other party, the power between the parties is considered "balanced."

If the power is relatively balanced between the parties, each party can participate in the mediation process effectively. If one party has significantly less power than the other party, the lawyer should discuss with the less powerful party whether the party believes that the imbalance would affect his or her ability to participate effectively in the process.

Not every power imbalance would preclude participation in the mediation process. The lawyer should advise the party that the skill of the mediator includes the ability to recognize and address power imbalances and the subtle shifts in power which occur throughout every mediation. In some cases, the lawyer can assist the party in equalizing power simply by being available with information and advice between mediation sessions.

In those cases where the party chooses to have the lawyer accompany the party to mediation, the lawyer's presence at the mediation session(s) in itself may be enough to help balance the power between the parties. Or, the lawyer may contribute to the balance of power by keeping the party focused on the problem-solving process, informed of relevant legal guidelines, and aware of the potential consequences of the various options under consideration.

Extent of Lawyer Participation

The mediator, the parties and the lawyers each have roles to play in the mediation process. The mediator must control the process of mediation in order to focus the parties on their task and guide them through the problem-solving process. The parties each must express their own thoughts and feelings, as well as the interests which each believes should be considered, in order to reach a satisfactory resolution of the dispute. The lawyers must represent their clients' interests in order to fulfill their ethical obligations.

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Some preliminary discussion between the lawyer and the party on this topic is indicated. Through this discussion, the lawyer may suggest to the party that various levels of lawyer participation are appropriate, and emphasize to the party that the lawyer's role in mediation is non-adversarial. The lawyer should explore with the party the range of participation that is possible.

Observation and Private Advice

The lawyer may participate in the mediation session(s) by simply observing the mediation and advising the party privately during breaks in the session(s). This affords the party the fullest opportunity to engage in collaborative problem-solving, while preserving the opportunity for immediate consultation with the lawyer. The lawyer and the party have the option of requesting breaks for consultation whenever either believes they are warranted.

The cases in which this approach is desirable are those in which there is or has been a significant relationship between the parties which is expected to continue, as in domestic relations cases where the parties have children together or sexual harassment cases where the parties have an ongoing employment relationship. These relationships generally benefit from the parties' direct participation in the cooperative problem-solving process of mediation.

The observation/advice approach may also be appropriate when one party has his or her lawyer at the mediation session(s) and the other party is present without a lawyer.

Direct Participation

In cases where there is no significant relationship between the parties, and where the lawyer has concerns about the power dynamics between the parties; (as in a personal injury suit), the lawyer may participate more actively in the mediation session(s) on behalf of the party.

Direct participation by the lawyer may vary from the lawyer occasionally supplementing the party's comments to the lawyer speaking on behalf of the party. For example, the lawyer might summarize the procedural posture of the case, outline issues to be decided, and define settlement goals. Note, however, that given the non-adversarial nature of mediation, the lawyer would not "examine" a party or raise objections to a party's statements.

When the lawyer participates directly in the mediation sessions(s), and particularly when lawyers for each party do so, there is a risk that the process will become an adversarial settlement conference rather than non-adversarial mediation. While the role of direct participant is familiar to the lawyer and is appropriate in adversarial contexts, it has its drawbacks in the non-adversarial context of mediation. A party is less likely to speak in mediation if he or she believes that the lawyer will do so on his or her behalf. Similarly, a

party is unlikely to accept personal responsibility for the settlement of the dispute if he or she is depending on the lawyer to settle it.

Caucus Sessions

A mediation technique, which a lawyer may encounter if he or she attends the mediation session(s), is the *caucus*. A caucus is a separate session between the mediator and each party to the dispute, outside of the presence of all other parties. A caucus session with a party would include the party's lawyer, unless the party instructs otherwise. Mediators should not engage in caucus with a lawyer outside of the presence of that lawyer's client.

Through caucus, the mediator explores privately with the party such matters as impediments to settlement and the consequences of various alternatives. Not all mediators use this technique. A caucus session requires specific disclosures and raises certain confidentiality and trust issues.

After Mediation

The lawyer assists the party in reviewing the terms of any mediated agreement, testing the party's understanding of the terms, and in some cases, preparing formal agreements

The lawyer also helps the party complete the legal process when mediation is concluded, whether mediation resulted in complete, partial or no agreement. The lawyer assists the party in re-entering the system upon completion of mediation. If full or partial agreement has been reached, the lawyers for both parties may request that the agreement be entered as a court order, where appropriate. Va. Code § 8.01-576.11. If no agreement or only partial agreement has been reached, the lawyer assists the party in continuing the process, which eventually will dispose of the entire case through trial or further settlement efforts.

Enforcing the Mediated Agreement

Because mediation is a voluntary process in which the parties take responsibility for and create their own solutions, parties are more likely to abide by the terms of any agreement reached. Thus, it is rarely necessary to take any action to enforce a mediated agreement. If and when necessary, the lawyer assists the party in enforcing the terms of the agreement as any other written contract.

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The Art of Persuasion in Arbitration and Mediation

A. Lee Parks Jr. and David F. Walbert

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There has been a sea change in litigation and dispute resolution during the past 25 years. Far more cases are resolved in alternative dispute resolution (ADR) than by trial, and the relative numbers continue to increase as mediation and arbitration continue to expand. Critical in all dispute resolution—traditional trial, mediation, or arbitration—is the Art of Persuasion. Collectively, the authors have been involved in well over 1,000 civil disputes, either as advocate, mediator, or arbitrator. From this practical experience, they have learned many keys to the Art of Persuasion, both in mediation and arbitration. Unsurprisingly, there is overlap in what the advocate needs to do in these two ADR methods, as well as differences inherent in the different formats of mediation and arbitration.



> Critical in all dispute resolution—traditional trial, mediation, or arbitration—is

> the Art of Persuasion.

Regardless of these similarities and differences, it is certain that successful advocacy in ADR requires that counsel hone their Art of Persuasion just as keenly as the best of the trial lawyers from a prior generation. In this article, the authors present some of the keys to persuasion they have learned. We hope that these suggestions will help you on your way to honing your own Art of Persuasion.

Arbitration

By David F. Walbert

In the final analysis, the Art of Persuasion in arbitration is winning, measured by how the average lawyer would do before a typical panel of arbitrators. If you do better, that's a win. If you do worse, that's a loss.

Simplicity. There are two big keys to winning in arbitration. The first is simplicity. You must explain simply and clearly exactly *why* your client should win. Your story, your theme, must be told so that it is understood immediately and is compelling. This story needs to be fact based. It is a story, not a legal pronouncement. Law school taught us that the law determined the outcome of cases, but we learn quickly that the facts are more what drive the outcome of cases.

Some people say that "the law follows the facts." By that, they mean that there is a legal proposition for almost anything, and judges or arbitrators apply the legal rule that justifies the outcome they "feel" is the right one based on the facts. If you can explain your case to your 15-year-old daughter or son in a few minutes and they "get it," you are on the right track. If you can't, you need to work on it until you can. This does not mean that the evidence should be artificially truncated. That will depend on the case and what is involved, but you will want your arbitrator to hear a succinct story at the outset. This story will set the arbitrator's mind to hear your evidence

from the point of view you need to win.

A famous trial lawyer once explained that a case was like a diamond with a thousand facets. The advocate's job is to hold that diamond up to the sun and rotate it until the light shines through in the most resplendent way, and that is what you should show the world. It's a good image to visualize as an advocate. How the facts are presented can give a judge, juror, or arbitrator a completely different perception of what happened and what the outcome should be.

Who is the arbitrator? The second key to winning an arbitration should be obvious, but many people give it short shrift. Just as with judges and juries, who your arbitrators are is critical. We are undergoing a massive transformation in litigation and dispute resolution. Arbitration of all kinds of cases is increasing dramatically. What has not increased commensurately is a focus on "who is my arbitrator?" and "will they be right for *this* case?"

It would be nice to think that arbitration was an ideal system where informed people applied objective legal principles to the true facts. To be sure, arbitration decisions produce a narrower range of results than jury trials, but by no stretch of the imagination are all arbitrators created equal. They bring their predilections, their experience, and their grasp of the material to their decision making. Notwithstanding the importance of who the arbitrator is, arbitrator selection gets less attention than it should. In a trial, your case may be decided when the jury is picked. The same is true for arbitration.

There are several things you can do to enhance your case with good arbitrator selection and increase the chances that your arbitrator will "hear your story." If you are striking from a panel, don't treat this as a perfunctory step in the process that is not worth much time. It may be the most important thing you do, more important than any brief you file, how you prepare your witnesses, or any of the other time-consuming things you do during arbitration. Typically, you'll have some background information

about a potential arbitrator's prior cases, but this is only a start. Call counsel from prior cases and talk to them about the arbitrator. Was she open-minded? Was he irritable? Or predisposed one way or the other? Beyond past service as an arbitrator, what can you learn about his or her life otherwise? In the Internet age, you can learn a lot. You should do at least this kind of research, and if the case is big enough to warrant the time and effort, do more.

There is also a second track that too few lawyers follow: agreeing to the arbitrators. Even if you have a specific selection mechanism in an arbitration agreement, the parties can agree to modify the selection method any way they want. Too many lawyers say, "The other side will never agree to that." In fact, the other side often agrees to something that may make sense for both sides. Assuming this can't happen foregoes an important opportunity to have a better panel.

More and more very complex technical cases are litigated and arbitrated. Too many times very smart judges and arbitrators are overpowered by statistical analyses or science and engineering testimony because they don't have that kind of background and simply "don't speak the language." In these cases, it is essential that arbitrators have sufficient expertise in math and science to (1) understand what you are saying; (2) understand your experts; and (3) be able to discern when the other side's experts are less than entirely accurate and candid. This does not mean the arbitrator needs to have a Ph.D. in the same field, but he or she does need to have the math and science training and facility to listen, understand, and, maybe most importantly, ask the right questions when necessary to distinguish the truth from the rest. The ideal arbitrator in these cases is an experienced trial lawyer who has a good pre-law education in science or engineering.

Some advocate a rigorous and stratified system of arbitrator selection and certification. This may be too much because having arbitrators who are experts in the exact subject matter may mean that they understand the evidence, but their own pre-conceptions play too great a role in their

decision. The right balance is someone with ample litigation experience who is sufficiently grounded in math and science to follow and understand technical testimony and to learn the specifics of the issues from the experts, without bringing too much prior knowledge to the dispute.

With the right arbitrator selection, your advocacy skills can do the rest. But without good arbitrator selection, your advocate skill will be lost, along with your client's case.

Mediation

By A. Lee Parks Jr.

Lawyers are trained to persuade. They pride themselves on their ability to win a trial, to prevail over the most worthy opponent. But those skills, as formidable as they might be, need an adversarial format to truly shine. They believe they are at their best in a courtroom or a face-to-face negotiating session where both counsel pound the proverbial table hard as they try to force their opponent to capitulate and meet their client's demands.

Today, the most successful litigators are counselors deft in the art of mediation. Multiyear disputes costing each side hundreds of thousands of dollars in litigation fees and expenses are resolved in a day in a setting that is judge and jury free, where the parties jointly craft their compromise in an atmosphere that is more a conversation than a combat. So, how do you maximize your chances for a successful mediation?

Choice of mediator. The Art of Persuasion in mediation starts with something you could never do in litigation, where you are randomly assigned a judge. The participants pick the mediator. It is the most important and impactful decision you will make in the process. Here is a three-step plan to help you select the right person to act as your mediator.

1. Choose a neutral with a recognized expertise in the substantive area

where the dispute lies, a good working knowledge of recent outcomes in similar cases, and familiarity with your forum and judge/arbitrator. Knowledge is power in mediation.

2 Look for someone the other side will listen to and respect. One big mistake lawyers sometimes make is trying to persuade opposing counsel to go with a mediator they privately believe might "favor" their side of the case. It is unrealistic to expect a quality neutral to have a bias in this regard.

3 Engage your clients in vetting the possible candidates so they become invested in the success of the mediation early on and get a sense of the control the parties have over the resolution process. Client participation in the selection of the mediator also increases the chances the mediator will be able to connect with your client in a way that positively impacts the chances for settlement.

Preparation. The second ingredient in the persuasion recipe is the preparation of counsel, the client, and the mediator. This starts with the submission of a great mediation statement that is not consumed with nuanced arguments on the merits but instead arms the mediator with ideas about creative solutions to the sticking points that might hamper settlement. Educate your mediator about how the dispute ended up in litigation and the major obstacles that have blocked resolution to date. Give your mediator a heads-up if emotions are running high—this is a problem the mediator will want to tackle early on. Lastly, if you need the mediator's help in managing your client's expectations, give your mediator a call to discuss the problem and strategize how the mediator can collaborate with counsel to focus the client on all the benefits of settlement counter-offers in the caucuses.

Helpful mediation statements are pragmatic. They focus more on deal points than the legal issues. For example, if insurance is involved, your mediator will want access to the adjuster and coverage counsel if there are issues in that regard. Are there non-monetary settlement terms that impact value independent of the merits of the legal claim, and when is the best time

to raise them? A good example of how a non-monetary issue can drive the monetary value of a claim is in sexual harassment cases where defendants' desire for confidentiality is uppermost in their mind. But the defendant sometimes decides not to push the issue at the outset for fear it will dramatically drive up the price of settlement. Work with your mediator in confidence to develop a strategy that will address hot-button issues early on and not leave them lingering until the end of the day when they could cause an impasse because a critical non-monetary term was not baked into case valuation from the outset.

The Art of Persuasion in mediation also requires you to prepare your client for the negotiation process. Lawyers are generally very good at making their clients feel supremely confident about their case. But don't wait until the day of the mediation to tell them the positions on value set forth in the initial demand letters and early counter-proposals are often best-case scenarios, not pragmatic settlement valuations. Your clients must understand from the outset they will need to make appropriate concessions as the mediation progresses. All too often, clients come to mediations unaware of the bargaining process, the use of caucuses as a way to progressively bring parties to a closer deal. Clients becomes frustrated by the constant request that they increase or decrease their last settlement proposal. It is important you involve your client in the negotiating strategy so they understand "how the game is played." Counsel must avoid the urge to revert to a litigation mentality on the eve of the mediation and oversell the plaintiff on the value of the claim, or the defendant on the quality of the defenses. Risk drives settlement.

Finally, the most persuasive counsel at mediation truly understands the transformation in perspective when you go from litigation, which is only about the past, to mediation, which is only about the future. There is irrefutable logic, and thus persuasion, when you invite the parties to assess a proposed settlement in terms of how it will affect their future. It is like asking them to look out their windshield rather than their rearview mirror as they continue their journey through life. Do they want to stay mired in the past,

obsessing over past grievances, or focus on all the things they could accomplish once they repurpose the considerable resources and emotional energy being expended in the litigation into building a better future? Remember, settlement can be a life-changing decision for clients. In important ways, they need you to guide them over the bridge to tomorrow, at a comfortable pace, by giving them permission to leave you, and the litigation, behind.

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