

Contra Costa Lawyer Online

The screenshot shows the homepage of the Contra Costa Lawyer Online website. At the top is a banner with the title "CONTRA COSTA LAWYER" over a landscape image. Below the banner is a navigation menu with links: "Current Issue", "Features", "Spotlight", "Pro Bono", "Self-Study MCLE", "About", and "MarketPlace". A secondary menu includes "Inside", "President's Message", "News & Updates", "Bar Soap", "Lifestyle", "LRIS", "Ethics Corner", "Coffee Talk", and "Magazine Archive". The main content area features a large article titled "I Agreed to Arbitrate That? Recent Developments in the Application of Arbitration Agreements" with a background image of a woman in a suit holding a scale of justice. Below this is a row of six small thumbnail images. The page is divided into two columns: "Spotlight" and "News & Updates".

CONTRA COSTA LAWYER

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The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA), published 12 times a year -
- in six print and 12 online issues.

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An Insurance Defense Attorney's Perspective on Effective ADR

Saturday, April 01, 2017

I would like to share my perspective on how to make the most of the ADR process. In my 33 years as an insurance defense attorney I have participated in hundreds of mediations. I have also served as a volunteer mediator for the courts in over 100 cases. In my view ADR is the most rewarding and productive part of litigation. It is a time where parties can amicably resolve their disputes rather than relying on the arbitrary decision of a judge or a jury. Here are six ideas on how to make your ADR experience more effective. [1]

1. Be courteous

It has been said: "Speak when you are angry and you will make the best speech you will ever regret." [2] Be kind and respectful. Shake hands and smile. Compliment the other side. Be self-deprecating. If appropriate tell them you are sorry. Whether you settle or not, leave with a kind word.

2. Use the joint session to your advantage

The joint session is a time to listen and to share. Do both. Do not allow the mediator to control the flow of information by breaking you out into caucuses too soon. Invite the other side to open up and tell how the injury has impacted their lives. Something good happens when people feel heard. Once they have had their "day in court" they may feel emotionally ready to let go and settle the matter. Actively listen and do not argue or correct.

3. Watch your body language

There is nothing worse than watching your client non-verbally accept a bad offer. It can be in the form of a smile, a nod of the head or the relaxing of a previously tense body stance. Work together as a team and practice how your body will react to new information.

4. Anticipate concession patterns

Before you start your mediation try to guess the other side's opening demand. Map out your responding number. Take it a step further and try to foresee the next demand and your response to it. Keep pushing the limits of your imagination until you reach the final settlement number. Readjust your figures if the ending point is not to your satisfaction. Remember that "tapering" (each concession systematically less than the one before) sends a strong message to the other side of where you want to end up.

) "Guard your bottom line

"Tapering" can send a strong message of where you want to end up, but you still want to guard your actual bottom line. Mediators are masters at figuring out your bottom line. Don't fall for the trick of guessing what the other side is willing to take or guessing what the next offer will be. Those are tools used by mediators to read you. Something unintended will escape you (verbally or non-verbally) when you bite at these lures. Your bottom line is something to keep to yourself—always—especially when the mediation is

over.

* "Watch out for last-minute grabs

We tend to relax and get sloppy when we are close to a settlement. Keep your guard up. Slow it down. Too much unintended information is disclosed when we are tired or impatient. The skilled negotiator will capitalize on your weakness and seek one more baby splitting move; or one last ditch effort to recoup the cost of the mediation; or one unacceptable settlement term relating to liens or the timing of the payment. Stay in the zone until you leave the building and are safely in your car.

In conclusion, effective use of ADR is a learned skill. The more you do it the better you get at it. When used correctly it can be the most rewarding and fulfilling part of your practice.

Footnotes:

[1]The views expressed are my own and do not necessarily reflect those of my employer State Farm.

[2]This quote has been attributed to American editorialist, journalist, short story writer and satirist—Ambrose Bierce.

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Mediating Fee Disputes Gracefully

Saturday, April 01, 2017



Sometimes clients fail to pay or dispute your bill because they are disappointed at the outcome of litigation. Sometimes they fail to pay because, although your work was properly performed, your billing methods are unfair or lack transparency, leaving your client unable to understand the bill, frustrated, and legitimately asking questions. In the worst situations, the work may have fallen below the client's reasonable expectations or the standard of care and the fee was undeserved. Getting into a fee dispute with a client can be a bit like walking through a minefield. Stepping cautiously may maximize your ability to recover fees due and help you avoid a malpractice claim or State Bar complaint. Both the California State Bar and Contra Costa Mandatory Fee Arbitration Programs provide for mediation as well as arbitration of fee disputes. It may be in your best interests to offer to mediate a fee dispute with the client before resorting to either litigation or mandatory fee arbitration. This article provides a roadmap to mediating fee disputes gracefully.

Initial Response and the Long Range Picture

When a fee dispute arises, your initial response is critical to the outcome. So, think first; don't just react! First, if you're still working on one or more matters, you may be able to wait for the conclusion of the matter(s), unless the relationship has become so acrimonious that it has become "unreasonably difficult...to carry out employment effectively," requiring you to withdraw from representation under California Rules of Professional Conduct, Rule 3-700(C)(1)(d). In a litigation matter, withdrawal may require a motion, which, depending how close the case is to a trial, might be denied if prejudice would result to the client.

Second, determine if you need to report a claim to your professional liability carrier. If you are coming up for your E&O policy renewal, you should report any claim of alleged malpractice before the policy expires. That can increase your premiums or impact coverage, even if your fees are ultimately adjudged fair.

Third, evaluate how the dispute will interfere with your ongoing practice. Fee disputes do

not generate income, and instead, generate stress. Moreover, successful law practices depend on relationship building. An unhappy client is a pipeline to other clients, can damage relationships, and no longer is a source of income.

Do You Have a Valid Fee Agreement?

Fourth, determine if you have a valid fee agreement. With very limited exceptions, Business and Professions Code Section 6147, subsections (b) and (c) require you to have a written fee agreement, signed by and delivered to the client. Moreover, if a written agreement fails to comply with the statutory requirements, the agreement is voidable at the option of the client and you may be entitled to only a quantum meruit or “reasonable fee.”

Are your Fees Fair and Accurate?

Fifth, carefully check the bills for accuracy, content, frequency, and overall compliance with Business and Professions Code Sections 6147 and 6148. Areas of concern include charges reflecting associate training, multiple, unnecessary court appearances, “block billing,” vague entries for “research,” meetings or layered staffing. If bills don’t pass the “red face” test, consider writing time off or down, rather than having to explain, justify, or rationalize it.

Be Responsive to the Client’s Concerns

Sixth, respond to the client’s concerns promptly and fully by offering to meet with the client in your offices, making clear that there will be no charge for the meeting. Personally go through the bill with the client; don’t delegate this to staff or junior associates. Listening and watching the client’s “body language,” you will be able to size up the client’s attitude. At the meeting, try to resolve the dispute, but regardless, memorialize the conversation. If the meeting proves unsuccessful, immediately offer formal mediation, either with a private mediator, experienced in mediating fee disputes, or through the Contra Costa Bar Association’s Mandatory Fee Arbitration program, recognizing that if mediation fails, mandatory arbitration is still available, usually without an additional filing fee.

Preparing for the Mediation Session

Seventh, before attending the mediation session, prepare yourself just as you would prepare any client for mediation. Discuss the dispute with other members of the firm. Come up with a consensus about how much you’re willing to give up at the mediation, either as a write-off, or even by way of a refund, if that makes sense and will resolve the dispute, but remain flexible.

Eighth, show up on time. Don’t send a junior lawyer. The mediator, who works for both sides, won’t be impressed by what might look like disrespect to him or her and to the client.

Ninth, if there is a joint session, let the client get it all out. Hear the client politely...without a patronizing half-smile! For clients, “perception is reality.” Look the client in the eyes, whilst not rolling yours, and courteously respond to the client’s concerns, even if you disagree. In private caucus with the mediator, ask yourself if someone else might see the dispute differently. Did you or an associate, working at a lower rate, take an unusually long time on a given task? Can you justify what might appear as an associate’s “learning

curve”? Clients don’t want to pay for training! Welcome the mediator’s guidance. You and a mediator experienced in this field, know that the “cost” of legal work is somewhat esoteric, and a write-down or write-off does not equal “lost money” to you, but may show understanding and good faith to a client. Don’t necessarily capitulate; just use common sense, courtesy and “business judgment,” always appreciating the risk of an adverse outcome to you and your firm.

Conclusion

Regardless of the outcome, a gracious attorney will look the client in the eye, shake hands, express regret over the fee dispute, and acknowledge it was an honor to have served as their attorney.

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I Agreed to Arbitrate That? Recent Developments in the Application ...

Saturday, April 01, 2017



Litigation stemming from Wells Fargo's improper opening of over 1,500,000 checking accounts and 560,000 credit card accounts has tested the limits of arbitration agreements and led to legislation to curb those agreements. [1]

In 2015, the Bureau of Consumer Financial Protection found that employees of Wells Fargo Bank had engaged in improper sales practices to satisfy sales goals under an incentive compensation program. This discovery resulted in several class action lawsuits, including *Jabbari v. Wells Fargo & Co.*, [2] in the Northern District of California. The lead plaintiffs in the *Jabbari* lawsuit had

opened legitimate accounts with Wells Fargo. They alleged that Wells Fargo had used information from those accounts to open fraudulent accounts and had diverted funds from the legitimate accounts to pay fees generated by the fraudulent accounts.

The account agreements for the plaintiffs' legitimate accounts contained broad arbitration clauses that covered "any unresolved disputes" between them and provided that the arbitrator would determine arbitrability. Wells Fargo moved to compel arbitration. The district court determined that it could only deny the motion if Wells Fargo's claim that the dispute fell within the scope of the arbitration agreements was "wholly groundless." [3] The court then held that the argument was not wholly groundless because the allegations of misuse of information and funds "may 'relate' to the legitimate accounts."

After the *Jabbari* plaintiffs' claims were compelled to arbitration, bills were introduced in Congress and the California Legislature designed to cure the perceived problem. The federal Justice for Victims of Fraud Act, S.3491, would prohibit enforcement of pre-dispute arbitration agreements with consumers in an action related to credit card or personal bank accounts unless the account at issue was opened in response to a request or application for that account. The California bill, SB33, is extremely broad and would prohibit imposing a waiver of a legal right that arises as a result of fraud, identity theft, and any other act related to the wrongful use of personal identifying information as a condition of entering into a contract for the provision of goods or services. [4]

However, legislative action may not be needed, because two arguments can be made that the dispute in *Jabbari* was not arbitrable. The arbitration agreements cited by the court in *Jabbari* may not have applied to the dispute at issue. Arbitration contracts, whether broad or narrow, have limitations. They only pertain to the activities that are within the scope of or are significantly related to the contract. A situation similar to *Jabbari* arose in *Aiken v. World Finance Corp. of South Carolina*. [5] In that case, plaintiff had executed a broad arbitration agreement similar to the one used for Wells Fargo clients. He filed suit after he discovered that employees of the defendant bank had used the

personal financial information and social security number that he had provided to defendant to obtain sham loans from other lenders and convert the proceeds for themselves. The rogue employees' failure to pay back the loans damaged plaintiff's creditworthiness. The South Carolina Supreme Court affirmed the denial of defendant's motion to compel arbitration, ruling that "in signing the agreement to arbitrate, Aiken could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct."

There have been similar results in other cases. In *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney*, [6] plaintiff purchased and financed an automobile, signing an arbitration agreement which covered all disputes arising from the "sale, lease, or financing of the vehicle". Later, plaintiff discovered that several of the dealer's employees had deliberately kept the car's title and used it to create phony titles for stolen vehicles. Plaintiff filed a lawsuit, alleging various tort claims. The Court denied defendant's motion to compel arbitration because the subject matter of the lawsuit was outside of the scope of the agreement. The Court determined that "no reasonable person would agree to submit to arbitration any claims concerning... a scheme of using his name to forge vehicle titles and bills of sale to sell stolen vehicles... actions of which (he) was presumably totally unaware at the time of the execution of the documents in question, including the arbitration agreement."

In *Clay v. New Mexico Title Loans, Inc.* [7], plaintiff took out a loan from defendant and put up his truck as collateral. The loan agreement provided for the arbitration of any claim or controversy "relating to this agreement or the motor vehicle securing this agreement". Further, the arbitration agreement specifically included tort claims. Plaintiff fell behind in his payments and defendant sent out agents to repossess the truck. An argument ensued and one of defendant's agents shot the plaintiff, permanently paralyzing him. Plaintiff filed a lawsuit against defendant, alleging various tort claims and defendant's motion to compel arbitration was denied because the subject matter of the lawsuit was outside of the scope of the arbitration agreement. The court noted that "(e)ven if (plaintiff) intended to submit to arbitration disputes related to the collateral or default clauses, it is not reasonable to conclude that he intended to give up his right to a jury trial if he was shot during the repossession."

The disputes in *Aiken*, *Clay*, and *Blakeney* were significantly unrelated to the business relationship contemplated by the contract that contained the arbitration clause and were not arbitrable. The events that gave rise to the dispute in *Jabbari* were not contemplated by the contracts that contained the arbitration agreements and they, too, should not have been arbitrable. [8]

[1] In 2015, the federal Consumer Financial Protection Bureau found that employees of Wells Fargo Bank had engaged in improper sales practices to satisfy sales goals under an incentive compensation program devised by Wells Fargo management that included the opening of over 1,500,000 checking accounts and 560,000 credit card accounts. In 2016, the Bureau fined Wells Fargo \$100 Million for this practice. <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/>

[2] *Jabbari v. Wells Fargo & Co.*, United States District Court for the Northern District of California, Case No. 15-cv-02159

[3] See *Qualcomm, Inc. v. Nokia Corp.*, (Fed. Cir. 2006) 466 F. 3d 1366, 1371; *Zenalaj v. Handybook, Inc.*, (N.D. Cal. 2015) 82 F. Supp. 3d 968, 975.

[4] Although SB 33 does not contain the word “arbitration”, the press release issued by the bill’s author seems to indicate that it is aimed at arbitration contracts. If a court finds that its purpose was to limit arbitration contracts by barring arbitration of any dispute where there is an allegation of fraud, it will be preempted by the Federal Arbitration Act. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, (1967) 388 U.S. 395.

[5] 644 S.E. 2d 707 (S.C. 2007)

[6] 950 So. 2d 170 (Miss. 2007)

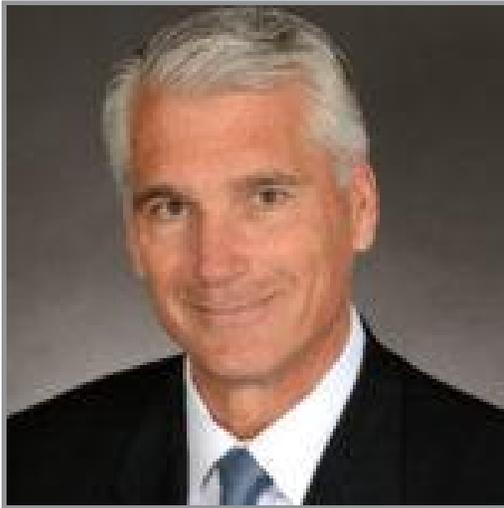
[7] 288 P.3d 888 (N.M. 2012)

[8] The case docket in *Jabbari* reflects that the parties have filed a motion for preliminary approval of a class action settlement. Hence, the court’s ruling on the motion to compel arbitration may never have any precedential effect.

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Civility and the Mediation Process

Saturday, April 01, 2017



Civility is more critical to the mediation process than to any other form of dispute resolution. The reasons are several: First, unlike trial and arbitration, success in mediation depends entirely upon adversaries agreeing. No agreement; no deal. To no surprise, civility helps draw people toward a consensus, while incivility has the opposite effect.

Second, behavioral studies of client and attorney decision-making show that lawyers *and* clients often develop unduly optimistic views of their litigation prospects, often with unfortunate consequences. [1] As these studies reveal, both clients and counsel predict their chances of success with levels of confidence that defy mathematic principles and common sense. In turn, they often turn down pre-trial settlement opportunities only to incur much less attractive adjudicated outcomes – both for clients and counsel-client relationships.

Third, other psychological studies, by no means unique to disputes, reveal patterns whereby we all seek out reaffirming information and discount contrary data. Often referred to as cognitive dissonance, this phenomenon impacts us all, particularly under adversarial situations, where the contrary position and the adverse parties are discredited in favor of our rosier predictions.

Now link these phenomena to the mediation process: Lawyers and their clients approach mediation with rose colored glasses and a proclivity to undervalue the other side's position, and no one can make you do anything – not the mediator; not anyone. With these phenomena in mind, civility is critical to success – in initiating the mediation process, presenting your position, and conducting the mediation session.

Commencing the mediation process: Incivility is often the biggest hurdle to simply initiating a mediation. Having served as the general counsel of different companies, I encountered several instances where our counsel warned that mediation would be pointless precisely because the other side was incapable of being civil.

However, we decided to plow ahead anyway with mediation, trusting our team and the mediator to maintain decorum and focus upon a realistic discussion of strengths, weaknesses, alternatives and tradeoffs. These efforts consistently bore fruit, immediately if not soon thereafter, contrary to the prior predictions. Obviously, maintaining a civil discourse from the outset is the best set up. But even in the face of prior incivility (on the other side *as well as* your own), the mediation forum provides a fresh opportunity to civilly engage with the aid of a skilled neutral.

Presenting your case: Remembering that counsel and clients start out with rose-colored glasses and an unfavorable view of the other side's position, imagine the impact of a mediation brief laced with invective as to parties and their positions. Briefs maligning the other side's intentions, brimming with words like "frivolous", "specious", or "baseless" rarely change the adversary's mind. Rather, they prompt the adversary to reply in kind, and the exercise devolves into both sides focusing on the slights and affronts rather than the merits of the dispute.

So what to do? Leave the incendiary language at home. First, focus on the essential elements of liability and damages – what's there and what's not. Concurrently, exercise the discipline to only argue what truly matters. Strong points are lost in the mire of arguing everything, and worse, minor points distract the mediator and impede the mediation.

Second, share your brief with the other side. While some courts mandate such exchanges, other courts and regional practice may not. Do it anyway. If your purpose is to convince the other side to compromise, this is one of your best means of doing so. Concurrently, holding back your best evidence rarely makes sense. Despite the protest that one side needs to hold their "smoking gun" in reserve, rarely does that protest hold up to scrutiny. To the contrary, cases settle *because* the parties have exchanged more, rather than less.

Civility at the mediation session: Practicing civility at the mediation session also produces unmistakable dividends, starting with your credibility with the mediator. While mediators take pride in our neutrality, uncivil behavior directed at the other side or the mediator is sheer madness. While your mediator does not decide your case, she or he will be positively or negatively impacted by the tone and level of professionalism counsel and their clients exhibit, with corollary effects on the mediation session.

Interestingly, the fear of uncivil exchanges has prompted many attorneys to avoid joint sessions altogether. But think about this tradeoff: The joint session may be your only real opportunity to speak directly with key decision makers about strengths and weaknesses, freed from concerns that what you say can and will be used against you. It is also an opportunity to show that you are not the demon or simpleton that maybe, just maybe, you have been described to be by adversary counsel. This is also your chance -- shorn of invective and affronts -- to tell the compelling story that you will lay out to a judge, jury or arbitrator if the case does not settle. Properly executed, this type of presentation will shape the mediator's assessment, and with the neutral's input, should prompt the adversary to reevaluate their position. It takes poise, discipline and confidence. But isn't this what you have been trained to do?

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[1] See, Donna Shestowsky, J.D., Ph.D., University of California, Davis School of Law, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, Iowa Law Review, Vol. 99., No. 2, 2014, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=402976 ; Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision-Making for Attorneys and Clients* (Springer 2010), pp. 29-48; Mark LeHocky, *Navigating the Litigation Conversation: Confessions of a Litigator Turned General Counsel Turned Mediator*, Best Law Firms 2016, 6 th Edition, U.S. News & World Report, www.issuu.com/bestlawyers/docs/blf2016-cover-elements/52?e=3342698/30903449

Choosing a Great Mediator

Saturday, April 01, 2017



Lawyers are paid to be advocates; and to get results.

So why use a mediator? Mediators resolve cases. Isn't that the lawyer's job?

Litigation is adversarial. It can be tough to talk openly about your case with your adversary. You never know how much to say - and anything you say may (and sometimes will) be used against you.

Enter the mediator. Mediators are neutral. They don't take sides. They don't hold grudges. They aren't trying to set you up.

Mediators can get places nobody else can. Good mediators promote open dialogue between the parties. And once people talk candidly about their cases, great things happen.

A mediator holds a powerful position. Once a caucus begins, the attorneys are entirely dependent on the mediator for cues and clues about the other side. Only the mediator has access to the other side's comments. All positions, claims and defenses are filtered through the mediator. Only the mediator has access to those important clues – body language, tone of voice, word choice – which are vital cues as to how the other side feels about their case (and yours). Nobody has as much access to critical information as the mediator.

A good mediator can make or break a settlement. In some cases attorneys have felt like their mediator gave up too soon and too easily, where the case could have settled if only the mediator had been more persistent. In other cases a skillful mediator has literally hammered out a solution to a case that seemed unsolvable.

Below are five things to look for in choosing a great mediator.

1. Bright. Mediators must clearly understand the key points of a case. They have to be able to analyze the strengths - and weaknesses - of both sides. And they have to do this quickly. If your mediator doesn't understand all the dynamics of your case before your mediation begins, he or she will spend precious time getting up to speed on your case instead of crafting a solution with your adversary. Choose a mediator who's bright.

2. Nimble. Litigation is war. Battlefield conditions change quickly. In order to make the most of their situation, great battlefield strategists turn changing conditions to their advantage. Mediation is no different. Arguments and evidence come out for the first time in mediation. Emotions run high. Perspectives shift quickly. Your mediator needs to effectively use changing conditions to advance a settlement. Choose a nimble mediator who thinks on his or her feet.

3. Perceptive. Perception is reality. Sometimes it doesn't matter how good your case is. If you think you have the world's best case and the other side thinks it's worthless, settlement will be difficult.

Parties and attorneys constantly provide clues about how they view their own case, how they feel about the other side's case, and the mediation process. A mediator who doesn't pick up on reactions and body language will miss a prime source of critical information. Choose a perceptive mediator who understands people.

4. Sincere. Cases are built on power. But they are often resolved through trust. Lawyers may trust a mediator's application of the law. And the parties will frequently respect a mediator's case evaluation. A mediator who gains the trust and respect of the parties (and their counsel) is in a far better position to resolve a case than one who doesn't. Trust lies at the threshold of respect, and sincerity lies at the threshold of trust. Few people can successfully feign sincerity, and even fewer will trust someone who seems insincere. Choose a sincere mediator who inspires trust.

5. Persuasive. A mediator must be confident. A hesitant mediator will never convince a party that they may lose their case. Confident, self-assured and yet friendly and approachable – an effective mediator will skillfully explore the relative costs and benefits of settlement as compared with continued litigation. Some cases are ready to settle regardless of the mediator's skill. But others settle only when the mediator has the ability to persuade the parties that a negotiated settlement is better than the uncertainties of trial. Risk and cost are key tools mediators use in settling every case. Choose a mediator who can help convince your opponent that settlement is their best option.

Life is full of choices. Thoughtful mediator selection can make a significant difference in the outcome of your case.

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Elephant in the Room - Attending to Power Differences in Mediation

Saturday, April 01, 2017



Most mediators would probably agree that the purpose of mediation centrally includes supporting parties in reaching an agreement. Where mediators vary is on what “supporting parties” means and what it takes to reach an agreement.

The issues surrounding reaching an agreement grow in complexity whenever the dispute involves power differences. How would a landlord/tenant mediation be different from one that involves two neighbors? What if one party is a black woman and the other is a white man? What if the black woman is the landlord?

When a significant power gap exists, mediators face the risk of an agreement that doesn't truly serve everyone – either because not all needs are heard, or because a solution is agreed to that does not actually work.

Early on, when the mediator engages to help the parties hear each other, people with less power often hesitate to name their needs. Think of a dispute involving an employee and a boss. The employee is well aware that the boss may retaliate. Think also of a societal power difference, where both white people and people of color, for example, are socialized to prioritize the needs and comforts of a white person. In either example, the person with more power – the boss or the white person – is more likely to feel free to express themselves in full and expect to be heard.

Later, when focusing on potential solutions, an agreement is only successful if it's truly voluntary and wholehearted. Any agreement based on fear, shame, guilt, desire for reward, or obligation, is unlikely to sustain itself into the future. In the presence of power differences, the likelihood of a de facto coerced agreement increases dramatically, because people with less power may say “yes” without engaging fully, lacking trust in the possibility of a positive outcome. Also, at the same time, people on both sides of the power gap may say “no” without considering the needs of the situation in full. This can look like a “rebellion” by someone with less power who is adamant about her needs being taken seriously, or someone with more power attempting to control the situation out of

anxiety about losing power.

When, on top of this, we take into consideration that mediators tend to be whiter, older, of higher income, and more educated than the general population in the US [1], then we can better understand the very “neutrality” of mediation can end up reinforcing the power and dominance of white, middle-class, and Global North norms. [2] Unless the mediator actively monitors power differences and intervenes to ensure that all needs are truly on the table and that all agreements are truly voluntary, the process and the outcome of the mediation too often will subtly favor the person in power. This is true even if the mediator is not of a privileged group, as the very norms of the profession align with individualistic, “rational,” and apolitical approaches derived from white, middle-class cultures.

What, then, can you do to increase the chances of all needs being on the table and agreements being wholehearted? The first order of business is to learn about power and privilege, and especially about the history and persistence of structures that systematically prioritize the needs, experiences, perspectives, and norms of some groups over those of other groups. This will help you become familiar with how you yourself may inadvertently and unknowingly contribute to a skewed outcome. [3] Only then can you have actual *choice* when you notice or suspect power differences. In addition, such learning will support you in being able to decode the often-silent expressions of power difference in the room.

Your goal as a mediator remains the same: to support both parties in hearing each other and in reaching an agreement that works for both of them. The way there, once you learn about structural privilege, will often mean compensating for power differences. Here are some elements you might practice:

- To expand the range of forms of expression, perspectives, and voices, you will likely need to step outside your comfort zone to welcome ways of speaking that are not as emotionally even or linear as you are used to. To increase the chances that all needs are included, you will likely need to persist in engaging with the less powerful until you are truly confident that they have expressed all their needs in full.
- Contributing to reaching wholehearted agreements often takes conscious intention to make it easier for the less powerful to say “no,” including slowing down and questioning a “yes” if you have any doubt about it.
- Maintaining everyone’s trust includes consistently reassuring both parties that their needs matter and will be included even while actively working to support the less powerful in coming forward, which can easily create discomfort for the more powerful.

Attending to power differences is tricky for everyone. Without conscious choice, you will likely become part of supporting the comfort of the powerful at cost to the less powerful, thereby interfering with the explicit goal of a mediation. To mediate effectively across power differences, you will ultimately need to develop your own experience and intuition about when and how to talk openly about power differences, including those of rank and those of social group differences such as race, class, and gender. Inevitably, this includes finding your own way of dealing with the discomfort of the powerful. What you will most gain from doing this work is your own sense of integrity in contributing to a world that works for all.

Miki Kashtan is a practical visionary pursuing a world that works for all, based on principles, tools, and systems that support true collaboration without compromising

efficiency. She co-founded Bay Area Nonviolent Communication and the Center for Efficient Collaboration, and has taught and consulted with individuals and organizations on five continents. She is the author of Reweaving Our Human Fabric and blogs at The Fearless Heart.

[1] For volunteer mediators, here is a look at the statistics: <http://blog.advancingdr.org/2013/08/volunteer-mediator-research-demographics.html>. For professional mediators, this is likely even more pronounced, as many professional mediators are initially trained as lawyers.

[2]
https://www.academia.edu/536074/Not_all_differences_are_alike_Mediating_across_Cultural_Differences

[3] In the dimension of racial inequality in the United States, there is a veritable information explosion on the systemic nature of white privilege. A classic starting point is Peggy McIntosh's "Unpacking the Invisible Knapsack" which you can find as a video here: or googling the article name. Also a classic is Tim Wise's "White like Me", both a video and a book. See also: <http://www.tolerance.org/magazine/number-46-spring-2014/feature/peggy-mcintosh-beyond-knapsack>; <http://www.agjohnson.us/glad/what-is-a-system-of-privilege/>. You might also consider looking up "Showing up for Racial Justice" for resources.

The CCCBA Supports ADR in Many Ways

Saturday, April 01, 2017

The Contra Costa County Bar Association runs a Mandatory Fee Arbitration and Mediation Program that provides an informal, low-cost alternative to the court system for Contra Costa County attorneys involved in a fee dispute with their clients. The program also provides a volunteering opportunity to mediators and arbitrators who would like to give back to the legal community by helping in this way.

The Bar Association's Lawyer Referral and Information Service has a FLARe (Family Law Alternative Resolution) program, which provides low cost mediation services for anyone going through the family law courts. Certified Family Law Specialists agree to provide a 90 minute mediation session for a greatly reduced fee.

Finally the CCCBA website provides links to many more organizations doing important ADR work in our community for free or reduced fees

Update on Mediation Confidentiality

Saturday, April 01, 2017



A magazine about Alternative Dispute Resolution in 2017 would not be complete without mentioning pending efforts to limit or create exceptions to the absolute confidentiality of mediation that is provided under California Evidence Code Section 1119. Statutory changes may well be implemented in 2018 and 2019. Both mediators and participants should understand the possibility that mediation communications and writings may be discoverable in certain situations.

Two California court decisions that protected the absolute privilege, despite creating arguably unfair results, have caused much consternation. In the first case, *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011), the California Supreme Court examined the effect of the mediation confidentiality statutes on private discussions between a mediating client and attorneys who represented him in the mediation. Michael Cassel sued his former attorneys for breach of professional, fiduciary, and contractual duties. He alleged that during a mediation, his attorneys had given bad advice, had a conflict of interest, and had coerced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth.

Before trial, the defendant attorneys moved to exclude all evidence of private attorney-client discussions immediately preceding, and during, the mediation, asserting that the evidence was protected under the mediation confidentiality statutes. The Court of Appeal reasoned that the mediation confidentiality statutes did not extend to communications between a mediation participant and his or her own attorneys outside the presence of other participants in the mediation.

The California Supreme Court disagreed, stating that the mediation privilege broadly provides for the confidentiality “of things spoken or written in connection with a mediation proceeding” *Cassel*, 51 Cal. 4th at 117-18. The Court noted that the statutory purpose of mediation confidentiality is to encourage a candid and informal exchange by “eliminating a concern that things said or written in connection with [a mediation] will later be used against a participant,” *Id.* at 124. In a concurring opinion, Justice Ming Chin questioned whether the Legislature had fully considered whether attorneys should be shielded from

accountability this way. He invited the Legislature to consider better ways to balance the competing interests rather than simply providing that an attorney's statements made during mediation to the client may never be disclosed, *Id.* at 139.

California Law Review Commission Study

In 2012, the California Law Review Commission was given the task of studying “the relationship between mediation confidentiality and attorney malpractice and other misconduct.” Although the Commission has not yet offered a final proposal, its current discussion draft would allow discovery and admission of communications and writings made during or prepared for a mediation if (1) relevant to an allegation of professional misconduct in the context of a mediation and (2) sought or proffered in a professional liability action or a state bar complaint against the lawyer. <http://www.clrc.ca.gov/pub/2017/MM17-08.pdf>. If adopted, this recommendation will allow the parties in the professional liability action to obtain records and testimony not only from their own counsel, but the mediator and other counsel as well. The Draft Tentative Recommendation is on the agenda for the Commission's April 13, 2017 hearing, which will be held in Oakland. <http://www.clrc.ca.gov/pub/Agenda-pdf/Agenda1704.pdf>. At the present time, it appears that the Law Revision Commission will strike a balance in favor of protecting litigants from malpractice by their counsel, even if it means that the broad assurances of confidentiality in mediation are reduced.

Disclosures Required In Marital Dissolution Not Protected

The second case, *Lappe v. Superior Court*, 232 Cal. App. 4th 774 (2014), arose in a marital dissolution. To ensure that the spouses provide accurate disclosures and that community property is equally divided, Family Code section 2100 *et seq.* requires the exchange of declarations of disclosures as part of a dissolution proceeding and before entry of any judgment. Frequently, the parties resolve allocation of assets through mediation and prepare the required disclosures with a mediator's help.

Gilda Lappe participated in mediation with her then husband, Murray Lappe, who completed his mandatory disclosure during the mediation. The disclosure stated that his business was worth \$20 million. Following the mediation, the parties entered a stipulated judgment, in which Gilda Lappe released her community property interest in exchange for payment of \$10 million. Approximately five months later, Murray Lappe allegedly sold the company for \$75 million. Gilda Lappe moved to set aside the judgment on the grounds of fraud, perjury, distress, and mistake. The trial court denied the motion, holding that the husband's representations of value were inadmissible under the mediation privilege. *Lappe*, 232 Cal. App. 4th at 777. The appellate court reversed, finding that mediation confidentiality statutes do not apply to statutorily-mandated disclosures that must be made regardless of whether the parties participate in mediation. The appellate court held that “because exchange of the declarations is mandated by the Family Code, these documents would have existed (and would have been exchanged) even if the parties had never agreed to mediate. Their introduction at mediation does not obviate the disclosure obligation or shield the declarations from discovery.” *Lappe*, 232 Cal. App. 4th at 785.

SB 217, which is designed to codify the appellate decision in *Lappe*, will add a new paragraph (4) to Evidence Code section 1120 to read:

[(b) This chapter does not limit any of the following:...]

"(4) The admissibility of declarations of disclosure required by Sections 2104 and 2105 of the Family Code, even if prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation."

You can track SB271's progress, and learn of any amendments to it, at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB217.

Mediation: The Cure for What Ails Your Case

Saturday, April 01, 2017



It comes up all the time: two parties who can't be in the same room for more than 10 minutes without coming close to blows, but don't have the money to continue to fund the litigation; the client who, no matter how many times you explain logically and rationally that their position makes no sense, refuses to change it; the client who figured out the value of their case with little or no input from you and refuses to budge, etc., etc., etc. These situations cry out for mediation – a process involving a dispassionate third party who listens attentively to what parties are saying (and not saying) and then works with them and their counsel to put the dispute to rest.

The Contra Costa Superior Court maintains a list of more than 300 highly skilled mediators, all of whom have specialized training. Most are accepted onto the panel after completion of 40 hours of mediation training. If they have not completed a 40 hour training, they are accepted only after their work experience and other qualifications have been reviewed by a committee composed of experienced mediators and the Supervising Civil Judge. Once accepted onto the panel, all mediators are required to take mandatory continuing education classes. Specialized training on how to work successfully with self-represented litigants is required on an ongoing basis. Many of the mediators are also licensed attorneys with years of legal experience. Others are accounting, real estate, construction or other professionals.

All mediators on the Court's panel have agreed to provide 30 minutes of preparation time and two hours of mediation time at no cost to the parties. This time allows counsel and the parties to get to know the mediator and get a sense of the benefits of mediation. Preparation for mediation is minimal, as all that is required is a brief statement of legal and factual issues in the case and previous attempts at settlement. The Court's panel includes mediators with offices in Martinez, Concord, Walnut Creek, San Ramon, Oakland and San Francisco, so it is easy to find a convenient location.

Overall, more than half of cases referred to mediation achieve a full or partial settlement. For certain types of cases, the settlement rate is much higher. For example, in calendar year 2016, 82% of real property cases referred to mediation reached a full settlement, while 55% of personal injury cases reached a full or partial resolution. Much of the success of the process is reflected in the enthusiasm expressed in evaluation surveys completed by parties after they have been through the process. These surveys include comments such as, "the mediator really listened to what I had to say" and, "I had all but given up on this case, but our mediator was endlessly patient and eventually got the parties to agree."

Mediation through the Alternative Dispute Resolution office is available at no cost to parties in all civil unlimited jurisdiction cases in Contra Costa County.,[a href="#"_ftn1">](#)[1]

A list of mediators is available on the Court's website (www.cc-courts.org/civil); just look under the heading for "Court Process and Information" and click on the link for "Alternative Dispute Resolution (ADR) Programs." Additional information about the mediators, including their particular areas of expertise and fees, is available by calling the ADR office at (925) 608-2031 or by checking the spreadsheet that is posted on the court's website.

Once the parties have selected a mediator, a completed mediator Selection Form (ADR-201) is submitted to the ADR office. Bench officers can routinely be relied upon to allow parties the time they need to complete mediation. Parties also have the satisfaction of asserting some control over the eventual result in the case.

SO – if you are at your wits' end – consider trying one of our mediators. These trained professionals can not only help you keep your sanity, but they will also help you achieve a result that satisfies your client and, usually, saves them money.

[1] If mediation is not right for your dispute, consider using one of the other forms of Alternative Dispute Resolution. Information on all of the Contra Costa County Superior Court's Alternative Dispute Resolution programs can be found online at <http://www.cc-courts.org/civil/alternative-dispute-resolution.aspx>.

Magda Lopez worked as a civil litigator for over 20 years before joining the Contra Costa County Superior Court. She is a Certified Mediator and the Administrator of the Court's Alternative Dispute Resolution Programs.

MCLE Self Study: Ethical Pitfalls of Mediating with Self Represente...

Saturday, April 01, 2017

Earn one hour of Legal Ethics MCLE credit by reading the article below and answering the questions on the Self-Study MCLE test. Send your answers, along with a check (\$30 per credit hour for CCCBA members / \$45 per credit hour for non-members), to the address on the test form. Certificates are dated as the day the form is received.

Self-represented litigants pose unique challenges in every aspect of litigation. The process of filing a lawsuit, bringing or responding to a motion, conducting or responding to discovery, and presenting evidence and arguments at trial all require skills, knowledge, and experience that the self-represented litigant typically lacks. No wonder many self-represented litigants turn to mediators for help resolving their claims.

Serving as a mediator in a case where one or both parties do not have counsel can create ethical dilemmas for the mediator. California has not adopted a code of ethics that governs mediators in private settings. Attorneys acting as mediators continue to be bound by the California Rules of Professional Conduct. Mediators in court-connected mediation programs, such as the reduced fee mediation program provided by the Contra Costa Superior Court, are bound by the standards of conduct contained in the California Rules of Court, Rule 3.850 *et seq.* While these Rules do not govern all mediations, they provide a useful touchstone for the mediator and are the basis of this article.

The best practice is for the mediator to encourage the parties to obtain counsel in advance of the mediation. When mediation participants are not represented, the mediator may often find herself making ethical decisions throughout the course of the mediation. The fundamental right of the parties to make their own decisions is set forth in Rule 3.853, which provides that:

A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. For this purpose a mediator must:

- (1) Inform the parties, at or before the outset of the first mediation session, that any resolution of the dispute in mediation requires a voluntary agreement of the parties;
- (2) Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time; and
- (3) Refrain from coercing any party to make a decision or to continue to participate in the mediation.

At first reading, this seems a simple concept. The parties will evaluate their respective positions, make decisions, and resolve the case – if they reach a voluntary agreement. But, what if one party has an attorney, who is taking positions not supported by applicable law, with the result of an *unfair* result to the unrepresented party? Can the mediator ethically explain the laws to the unrepresented party if doing so is necessary to assure a fair result? Rule 3.857(b) provides guidance, explaining that “A mediator must conduct the mediation proceedings in a procedurally fair manner. ‘Procedural fairness’

means a balanced process in which each party is given an opportunity to participate and make uncoerced decisions. *A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties.*” (emphasis added). As long as the mediation is conducted in a balanced process, the rules do not require the result to be fair.

There is some flexibility in what the mediator can convey. Mediators are often selected because of their familiarity with a particular area of law. Indeed, the Contra Costa Superior Court program lists mediators by area of expertise. Rule 3.857(d) explains that “Subject to the principles of impartiality and self-determination, a mediator may provide information or opinions that he or she is qualified by training or experience to provide.” The drafters’ notes for this rule explain:

[A] mediator may (1) discuss a party's options, including a range of possible outcomes in an adjudicative process; (2) offer a personal evaluation of or opinion on a set of facts as presented, which should be clearly identified as a personal evaluation or opinion; or (3) communicate the mediator's opinion or view of what the law is or how it applies to the subject of the mediation, provided that the mediator does not also advise any participant about how to adhere to the law or on what position the participant should take in light of that opinion.

* * *

This rule does not determine what constitutes the practice of law. . . . A mediator should exercise particular caution when discussing the law with unrepresented parties and should inform such parties that they may seek independent advice from a lawyer.

When a party has an attorney, the mediator can often use skillful questions to bring out the benefits of resolution and the risks of continued litigation. Mediators may ask: “What are the primary legal or factual hurdles you will need to overcome? What remains to be done before trial? What costs and legal fees will the party incur if the matter is not resolved? What is the verdict range for recent cases of this type?” If the mediator obtains information harmful to the represented parties’ case in private caucus, the attorney will almost certainly demand that the mediator keep that information confidential. The attorney will also often request that the mediator advise the unrepresented party about facts or legal authorities helpful to the represented party.

In a case where both sides are represented, the mediator can convey the information and feel (reasonably) confident that the attorneys will analyze the information conveyed and explain the risks and benefits to their clients. But, when a party is not represented, asking questions about the risks may cause the party to believe that the mediator sees critical flaws in the case. The mediator needs to evaluate whether conveying only the risks (as requested by the other side) creates a situation that is procedurally unfair. Moreover, what if the mediator’s “training or experience” leads him to recognize fundamental flaws in the represented party’s case? Most mediators would never point out that the case was not timely filed and advise the defendant against settling. But, some mediators are comfortable explaining the concept of the statute of limitations and allowing the unrepresented party to determine whether the case was timely filed. Others would recommend that an unrepresented party read more about “affirmative defenses.” When a mediator is not comfortable with the options, the safest course is to urge the unrepresented party to seek independent legal advice before entering a settlement.

If the unrepresented party declines to seek outside counsel, and the mediator “suspects

that” the “participant is unable to participate meaningfully in negotiations,” Rule 3.857(1) gives the mediator the option of withdrawing or suspending or terminating the mediation. This must be done, however, “without violating the obligation of confidentiality and in a manner that will cause the least possible harm to the participants.” *Id.* Thus, even disengaging from the mediation creates ethical risks for the mediator.

MCLE Self-Study Test

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Bar Soap

Saturday, April 01, 2017



As I mentioned in my last Bar Soap, the Contra Costa High School Mock Trial Competition was on the horizon. It has now taken place and it was the usual tremendous success. Miramonte High School was the winner this year. That makes two years in a row for Miramonte. I served as judge two nights during the preliminary rounds. I never cease to be impressed by the skill and enthusiasm of all the participants who appeared before me. Another shout out needs to go to all the volunteer judges. Many of our sitting judges volunteer their time, as well as many of our local attorneys. Additionally many of our local judges and attorneys spend months with the high school students, mentoring them as they prepare for the competition. Thanks to all for making it an incredible experience.

Let's chat now about the concept of "flouting the law." By that I mean the issue of so many drivers obviously operating motor vehicles while using their mobile devices in obvious view of anyone who cares to look. People ask me, "Isn't there a law against that?" In fact there is. With that recurring question in mind I asked a CHP officer and several local police agency officers if their respective agencies were writing tickets for mobile telephone use while driving, as well as texting and driving. I was told by all that indeed they are writing scores of tickets. However, the problem is so big they cannot possibly cite everyone, even when they see the violations. Otherwise, that is all they would be writing. I then contacted a traffic court commissioner and inquired if those types of cases are arriving in traffic court with any frequency. I was advised that at least 25 cases per day come before one traffic court on that very issue. So folks, it is not that the police are not writing tickets. It is also not that the cases are not getting to court. It is simply that the people are flouting the law. As an aside, I recently asked a local police officer if her municipality benefited financially by writing more traffic tickets. Her answer surprised me. Most of the revenue goes to the State of California, not to the local municipality.

Inn of Court

It's time to mention once again our wonderful Robert G. McGrath American Inn of Court. Hard to believe we are coming up on 20 years of its existence. Goodness, I was president of the Inn in 2006 and 2007. We had our 10 year anniversary celebration back then and we presented an award to Judge McGrath's wife. Wonder what the Inn has planned for the 20 year anniversary? If you are not a member, please get an application. There is a waiting list. It is a very fine organization and you will not be disappointed at any meeting with the presentations and the dinner following the presentation. This year our Inn president is Dean Barbieri. Great name for a law school dean I'm thinking!

On the Move

As for people on the move, we know that Dean Barbieri moved into the Inn of Court president's spot. So who else is on the move? I see that Ken McCormick has hung out his own shingle. He now has a new position at McCormick Law Firm. Rob Robards has a new position at the Law Offices of Robards & Stearns. Rob was my new associate way back when I opened the new Sacramento office of Ropers, Majeski, Kohn, Bentley, Wagner & Kane. And speaking of Ropers Majeski, our new Bar President Philip Andersen and I were colleagues at that firm in the 90's. 1990's that is, not 1890's. And I guess, speaking of me, I was just elected to the board of the Walnut Chamber of Commerce. And I am now a proud member of the Mt. Diablo Beekeepers Association and I just got my Ham radio license. My wife asked, so where do you think you can find the time for all that plus everything else? We shall see. The honey is awfully good I must say.

The 100 Club of Contra Costa County is dedicated to provide immediate financial and moral support to the surviving spouse and minor children of peace officers and firefighters who have died while in the line of duty in the county; to assist with the continuing educational needs of the children; and to provide ongoing emotional support to the family. The current president of that wonderful organization is Dominique Yancey, an attorney in the District Attorney's Office.

For those of you who missed it, Jill Fannin is our new Presiding Judge. Not sure if congratulations or condolences are in order. It is a two-year term and as for all those budget issues we hear about with the courts: they are in her lap now. I will however offer congratulations. For my practice in the Civil Courts in Martinez, the only change we will see is Judge Austin back in place in Judge Fannin's spot on the civil bench. Anyone notice that spring in his step now that he is not the PJ? Lots of other changes, but you can look them up on your own. We have seen the retirement of Judge Maddock, and the rumors that a couple of other judges will soon be out the door. If you have your judicial application on file, there might be a chance for you to get a spot. By the way, how many of you have downloaded a judicial application? I think there is even a question about your mother's mother's next door neighbor's nickname. It cannot be completed in a weekend is all I am saying.

In Memoriam

Every Bar Soap comes with the mention of the passing of local attorneys and luminaries. This one is no different. Wayne V.R. Smith passed on January 12 of this year. He was a wonderful person and practiced right up until the time of his death. He practiced law in Northern California for 45 years. Wayne was a University of Texas at Austin Law School

alum. He died unexpectedly of a heart attack.

Henry O. Noffsinger of Martinez passed in November of last year. He graduated from San Francisco Law School and practiced until his retirement in 2004.

Lee Bardellini of Hoge Fenton recently passed. A very nice man and a very well respected Bay Area attorney, Lee graduated from Hastings School of Law.

Although not a lawyer, but a friend and former Fire Chief of the Consolidated Fire District, William Maxfield died on January 8 of this year. After retirement he did not let any grass grow under his feet. He started a company called 9-1-1 Consulting and among other things, was instrumental in getting a number of fire safety regulations enacted into law.

Another Issue

An issue worth mentioning to practicing attorneys is the withdrawal from representation of a client due to non-payment of fees. That is a sticky issue and all too often a problem in our industry. The point which needs to be made is that at all times one must be aware of confidential client information. That means one must never state in a declaration in support of withdrawal that the withdrawal is because the client is not paying. I just saw such a declaration in a case. It obviously puts a client in a disadvantage in relation to the "other side." Initially one should advise a conflict has arisen such that withdrawal is required. If necessary at some point an offer of an in camera discussion with the judge may be offered. One can certainly see that an opponent knowing a client cannot pay his counsel gains a distinct advantage.

Keep your eyes and ears open for a Civil Jury Verdicts column to follow. I even have a jury verdict of my own to report. And continue to keep those cards and letters coming.

What Do You Look for When Choosing a Mediator?

Saturday, April 01, 2017

Coffee Talk is a regular feature of the Contra Costa Lawyer magazine. We ask a short question related to an upcoming theme and responses are then published in the Contra Costa Lawyer magazine.

What do you look for when choosing a mediator?

I look for someone who has experience in personal injury work (Plaintiff or Defense) and who allows the parties to have a joint session at the beginning of the mediation.

-Phil Andersen (CCCBA Board President)

I tend to prefer retired judges. While not necessarily true, they tend to carry more weight with clients, particularly when they tell them how things work in court and what they might have done with the case when they were on the bench.

-David S. Pearson, Law Offices of David S. Pearson

Someone who can really lean on the parties and push them to a settlement. I have had mediators who have little backbone to push things along and those mediations take twice as long as they should.

- David A. Arietta, Law Offices of David A. Arietta

1. Has the person been trained in the mediation process? Many people think they can mediate, but if that person has only been a decision-maker, it can be challenging for them to stop telling people what to do. Mediation is not the same as arbitration or a settlement conference, and the skills to manage the process are very different.
2. Closely related is the following: Does the mediator understand their role as an impartial, non-decision-maker? Recently, mediators have started offering, what euphemistically is referred to as a "mediator's proposal." This often happens when the "mediator" listens for some period of time, and then says, "Do you want to hear my settlement proposal?" Their opinion inevitably can have significant influence on the outcome. It may also demonstrate a bias, which could end a mediation prematurely. Recent research is showing that those who accept a "mediator's proposal" are more likely to suffer from "buyer's remorse."
3. Have they mediated similar cases? One should look for a mediator who has subject matter understanding and has mediated similar cases. One is better served with a "specialist" rather than a "generalist."
4. Do they understand the local rules and statutes that relate to meditation? This is becoming very important in California, as many mediators explain mediation as a confidential process, but fail to disclose that any attorney and mediator malpractice are also shielded during that process. Unless parties understand the full implications of confidentiality, they may be in for a very big surprise. This issue has been a hot topic for several years at the California Legislative Review Committee.
5. Does the mediator subscribe to a code of ethics? With no regulation of mediation in California, it would be nice to know that a mediator at least subscribes to a

professional code of conduct and ethics.

These are just a few of my thoughts. As longtime ADR faculty at the National Judicial College, Steve Gizzi and I are in tune with what makes a good mediator.

Nancy Neal Yeend, ADR Projects Manager

Gizzi, Reep Foley

Is this person knowledgeable in the subject matter? Do they have litigation experience on which to rely on when guiding parties towards settlement? Do we think the potential mediator's personality will mesh well with the parties?

For cases where there is a significant power imbalance between the parties, does the mediator have a strong backbone?

Thank you for the regular, thought-provoking questions.

-Gary Vadim Dubrovsky, Dubrovsky Law

Thank you to all who answered this month's Coffee Talk question. Please watch your email for future Coffee Talk topics.



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