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## Revisiting the Basics

# Ethics and Professionalism in Mediation

By Christian Stegmaier

I practice in a jurisdiction where members of the bar exhibit an overwhelming amount of civility and competence. Most days, I take pleasure in working with opposing counsel as we litigate our clients' cases. This includes mediation. But from time to time I experience bad days when mediating, typically precipitated when someone in the equation forgets the rules of the road to successful alternative dispute resolution (ADR). After recently having a disappointing experience, I became motivated to write this article to remind both myself and my colleagues what fosters a great environment for meaningful mediation: professionalism.

The formula for successful mediation includes preparation, candor, fairness, the ability to keep an open mind, and reasonableness. Also, professional advocates leave the theatrics and unnecessarily adversarial positions back at the office and show up to mediate with resolution in mind. Attorneys following this formula set up their clients for favorable outcomes. Attorneys can produce a mediation that fulfills its purpose by keeping these additional observations in mind: do your homework, practice forthrightness with your opponent and demand the same in return, deal fairly with codefendants, and iron out critical components of a release during a mediation.

## Do Your Homework

Most mediating cases have been around a while. The parties have completed substantial investigation and discovery. You have boxes full of information. You know the case backward and forward. However, when preparing for a mediation, remember that the mediator will have less familiarity with the information than you do but is nevertheless very important to a successful resolution. A mediator needs you to provide critical information—the who, what, where, when, why, and how—well before the morning of a mediation. If you want a mediator to

articulate your position effectively, you have to arm him or her with the information critical to your case. Therefore, a diligent lawyer (1) prepares a concise, yet thorough pre-mediation brief for a mediator; (2) delivers the brief at least one week before mediation; and (3) then holds a short, premediation conference with the mediator in the days leading up to the event. Lawyers who dutifully observe these steps typically achieve satisfactory mediations. Conversely, when lawyers fall down on this prep work, they often attain dissatisfying results. Moreover, inadequate preparation or insufficient consultation with a mediator becomes blatantly obvious to a client who generally will sit right next to counsel.

## Practice Forthrightness with Your Opponent and Demand the Same in Return

ADR is mandatory in my federal district and in a majority of the counties in my jurisdiction. Accordingly, whether our clients like it or not, they have to mediate in most instances. However, if mediation clearly is futile, or if the circumstances preclude a meaningful mediation, opposing counsel owe it to one another to make that clear before expending the considerable time and resources associated with mediation. If you anticipate that a problem will make a settlement impossible at mediation, explain those circumstances to a judge and the opposing counsel before rather than after the mediation.

The duties of candor and honesty also extend to important issues such as lien amounts. In this new era in which payors such as Medicare actively enforce their rights to reimbursement and set asides, coyness and unresponsiveness to direct inquiries about obligations to lienholders before, during, or after a mediation can make life unnecessarily hard.

## Deal Fairly with Codefendants

I am often involved in litigation with multiple defendants. While codefendants can agree on many aspects of a case, they also can have divergent opinions. Chief among the areas of dissonance are allocation of fault and indemnity. More often than not, these disagreements become apparent long before the mediation day, and

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## **Ethics**, from page 62


ordinarily you have ample time to determine how to respond. If your client withholds a position from a codefendant which, when revealed, will wreck the chance of resolution, bring this position to the attention of the codefendant's counsel before his or her client undertakes something time-consuming and expensive, such as flying across the country for the mediation. In other words, if your client's position will provoke a codefendant, make the position known before the mediation. Demand the same treatment from the codefendants' attorneys as well. This means that before a mediation you expressly need to ask

whether the codefendants will raise issues and present arguments that may create insurmountable roadblocks to a resolution.

### **Iron Out Critical Components of a Release During a Mediation**

The main point on which the parties fixate during a mediation is the dollar amount needed to attain a resolution. All too often other very important conditions that clients want to attain will fall by the wayside when attorneys dismiss them as "details to sort out later." Don't make that mistake. Too many cases fall apart after the parties supposedly struck a deal during a mediation because the parties could not sort out

those "details" later. So if your client identifies key issues, such as confidentiality, as critical resolution components, don't leave the mediation until you hammer out those terms and conditions and everyone is on the same page in a mediated settlement agreement. You'll be glad when you do and very sorry when you don't.

Our training, experience, professionalism, and commitment to ethics have taught us how to mediate the right way. We constantly need to apply what we know works, and not only expect, but demand, the same level of professionalism from the other counsel involved in our mediations. 

## **U.S. Discovery**, from page 31

- Ensure locally compliant U.S. litigation holds are implemented to the maximum extent possible, including proper recording and logging.
- Raise the issues in detail with opposing counsel and the court immediately. FRCP 44.1 requires that "[a] party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing."
- Consider immediate and consistent segregation of personal and non-personal relevant data, to permit early production and demonstrate compliance.
- Begin negotiations between litigation counsel at the earliest stages, and propose prioritization of information and production, including US production before foreign production and phased/staged discovery.
- Coordinate in-country data culling and review based on outstanding legal obligations and legitimate company interests. Record every aspect of the process, along with, pursuant to EU data law, the (i) purpose for which data is to be collected/transferred; (ii) location of data; (iii) measures to limit or narrow the culling process; (iv) types of data; (v) description of protections in place; (vi) notice procedures with data subjects, as necessary; (vii) notice to third parties involved and confirmation of their compliance with legal requirements; (viii) bases for legitimizing the processing and transfer; and (ix) provi-

sions regarding ultimate destruction or return of data and identification of persons responsible.

- Minimize data transfer from EU jurisdictions consistent with local law and the notion of proportionality.
- Determine with counsel whether data, or a segment thereof, may be transmitted pursuant to measures already in place (e.g., Safe Harbor, model clauses, BCRs).
- Propose and plan one-time only transfer of information to comply with EU guidelines as much as possible.
- Propose protective measures, such as anonymizing, pseudonymizing, or redacting data.
- Coordinate the entry of protective orders that provide for confidentiality of data, as well as ensure security of data from first processing through ultimate destruction.
- Determine whether and how to invoke the Hague Convention and, if so, collaborate with opposing counsel in reasonable discovery according to agreed procedures and avoidance of penal codes. Consider Convention options (e.g., letters rogatory or diplomatic process) and work to coordinate efficiency.

### **Fight Production?**

Jagger wonders: what if the client does not want to produce data and information? If so, he now knows the client will need to raise the issue as soon as possible with the court and address the discovery concerns in light of applicable law. As sug-

gested above, convincing a U.S. court may be challenging. However, a well supported and compelling argument (with support of foreign counsel, affidavits demonstrating the burdens of production and potentially limited access thereto, *etc.*) before the court may prevail, or guide the parties and the court to adopt an approach that is other than simply requiring production of all responsive data.

### **Bringing It All in for Landing**

It's been a long flight, but Jagger is convinced that each of the countries discussed above, and all those where discovery may be relevant, have an interest in resolving the existing conflict in laws in order to enhance commerce and avoid needless legal entanglement, while preserving legitimate interests of privacy. If governments do not take action in light of the prodding of courts, regulatory authorities and independent groups provided to date, then focused lobbying efforts should be undertaken. While there has been progress, parties whose legitimate disputes must be litigated should not be placed between "a rock and a hard place." The advanced age of technology and growing coordination of international markets make this unnecessary. The world's nations can and should produce agreements that protect both their citizens and multi-national organizations in the resolution of their respective disputes. As his plane touches down in Paris, Jagger marvels over how much his practice has changed in eight hours. 