

Mediation Advocacy

THE VIEW FROM ACROSS THE TABLE

By Geoff Drucker

PART 2 IN A 2-PART MEDIATION SERIES

At trial, litigators must know how to craft and present arguments in a manner that convinces judges to rule in their favor. At mediation, the litigator's goal is no different.

Advocacy is the art of convincing the other side to part with what your client most wants and require as little in return as possible. The better understanding you have of the other side's point of view and the better the impression you make during negotiations, the more persuasive you can be. Here are some key mediation practice tips:

Timing. Nearly 100 percent of cases settle before trial, so every litigator knows settlement talks are inevitable. Once you know enough to value a case, seize the initiative by suggesting mediation. Declaring your readiness to talk shows confidence, not weakness, and can establish credibility with the other side.

Attitude. If you want to reach agreement, be agreeable. You want to come across as competent, pleasant, and reasonable. Save the theatrics, combativeness, and intimidation tactics for the courtroom. Let the facts speak for themselves: explain the evidence that supports your client's viewpoint without adding editorial comments. The message you want to convey is that regardless of how you or the opposing side thinks the case should be decided, litigation is

risky. Explain why a jury might see the situation differently than they do, or how a judge might arrive at a different conclusion regarding the law. Steer clear of the absolutes litigators often employ. If you describe your arguments as "clearly correct" and "completely supported by the case law," and theirs as "frivolous" and "wholly unsubstantiated," the other side will feel obliged to respond in kind.

Those across the table will be far more willing to listen to what you have to say about risks and pitfalls of litigation if you demonstrate you are willing to listen to what they have to say. How thoughtfully you listen can have just as great an impact as how persuasively you speak.

Preparation. Because most voluntarily mediated cases settle, mediation is not a side show—it is the determining event. So you owe it to your client to prepare just as rigorously as you would if you were going to trial. Know the facts and procedural history, and carefully assess the time and costs associated with proceeding to trial. Litigation risks include not just the chances of losing but also the price of winning.

Your client needs to be just as prepared as you are. This means having clear goals and interests, adequate settlement authority, a persuasive opening statement, and a willingness to consider alternative points of view and compromise where appropriate.

Information sharing. A key reason parties opt for mediation is the negotiator's paradox:

Sharing information increases the odds of reaching agreement, but the other side may be able to use the information to gain a more advantageous agreement. You can greatly reduce the risks of disclosure by taking full advantage of opportunities to communicate *ex parte* with the mediator. The mediator may be able to address your concerns without revealing any of the specifics you do not want the other side to know.

In addition, the mediator can help you phrase and time overtures to the other side for maximum impact. You can also ask the mediator to convey your settlement proposals as if they were his. Parties often react much more positively to a "neutral" proposal than one they think came from the other side.

Patience. Mediations often consume an entire day or stretch across several days. At times the pace seems glacial, and gaps between offers look like yawning chasms. Do not panic. Show the other side you and your client are willing to stay the course. Mediations often play out remarkably like Hollywood movies: sharp conflict at the beginning, many surprises along the way, and, just at the moment when all hope seems lost, a happy ending.

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READY RESOURCES

■ *Mediation Practice Guide: A Handbook for Resolving Business Disputes, Second Ed.* PC # 4740056. Section of Dispute Resolution. To order online, visit www.ababooks.org.

Why ABA Membership—and Why Now?

By Michael Pellicciotti

As a member of the American Bar Association you are connected with the vast professional and human resources of the world's largest legal organization. It is never too early to connect within the ABA.

Whether you are developing a specialized practice at a large law firm, serving a variety of clients at a solo or small firm, or working in government or public interest law, the ABA offers you the personalized services to meet your current and future professional needs.

As an ABA member in your first five years of practice or under the age of thirty-six, you are automatically a member of the ABA Young Lawyers Division (YLD). The YLD leadership works to address challenges unique to newer attorneys, including student debt, issues of work/life balance, billable hours, rule of law, and access to civil legal services. Your YLD membership allows for our effective advocacy on your behalf regarding these issues.

For example, due to your membership, we successfully lobbied Congress regarding student debt reform for new attorneys. Just a few months ago, President Bush signed into law ABA-supported legislation that will generally provide full federal

loan repayment to those who practice public service law for a decade. Similar repayment options are now available under this law for those who practice in the private sector for two decades. We are supporting other bills in Congress that provide loan repayment to prosecutors and public defenders who serve the public for three years.

These advances on behalf of new attorneys around the country would not have been possible without your membership. Your membership also gives a united national voice to the local, state/territory, military, specialty, and minority bar associations around the country who compose our leadership.

There are, of course, additional professional benefits to ABA membership. Scores of sections, divisions, and forums make up the ABA and address various sectors of legal practice. You will find a home in the ones best suiting your particular professional interests and needs. You can easily join the sections' email committees to connect with leaders in your practice area, receive mentorship, and develop a national name for yourself. Most YLD members are eligible for a free section membership.

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Going Green at Work

By Nicole C. Kibert

The next time you climb over the mountain of paper in your wastebasket at the end of the day, perhaps you should consider whether it is time to take a serious look at your business operations and determine how to reduce your environmental impact. By adopting just one new sustainable behavior a month, an individual can have a significant, positive environmental impact by the end of the year. Just imagine what greening your entire office or all the offices in your firm can do.

Employees at all levels of a firm or business can help green their working environment. Below are several areas for lawyers and their staff to explore in making their law firms more environmentally friendly.

Communication. Survey at least one attorney and one staff member in each office who can explain any existing sustainability initiatives and act as greening champions. Ask them the following:

- What is currently being recycled (paper, plastic bottles, printer cartridges)?
- Are your shredding vendors recycling?
- What is the policy on electronics disposal?
- Does the firm distribute all firmwide communications electronically?

Procurement. Review your company's purchasing policy and revise it to include products that are environmentally friendly, such as:

- "post-consumer waste" products, including stationery, packaging materials, paper towels, and other supplies, which prevent waste from ending up in landfills;
- nontoxic cleaning supplies, inks, and other chemicals; and
- throwaway products (plates, cutlery) made of materials such as cornstarch that will quickly breakdown in a landfill.

Surplus products

- Find innovative uses for excess inventory such as outdated electronics by partnering with local trade schools or recyclers.
- Ask employees to come up with ways to turn that waste into something useful.

Consumption

- Turn off lights and appliances that are not being used.
- Replace high-energy-use light bulbs, fixtures, and equipment with their low-energy-use equivalents (look for Energy Star, LED, and compact fluorescents).
- Conduct more business online by transmitting documents as PDFs via e-mail rather than by delivery service (but make

sure you can easily strip metadata away).

- Consider purchasing Renewable Energy Credits to offset your company's energy consumption.
- Sponsor office challenges to encourage sustainable use of resources.

Lifestyle changes

- Reduce fuel consumption and pollution by encouraging carpooling and use of mass transit.
- Encourage reuse rather than waste by asking employees to bring their own coffee cups and water bottles to work instead of supplying them with wasteful paper, plastic, and Styrofoam cups. To make this work, you may need to have dishwashing space in each break room or add dishwashers.
- Institute paper, can, glass, and plastic recycling if your office has not already.

Investment policies

- Consider including sustainable fund choices in investment plans, e.g., Calvert Funds (www.calvert.com) or Green Century Funds (www.greencentury.com). Socially Responsible Investing (SRI) balances financial investments with a wide range of social issues.

Office space

- Review your leases to identify recycling services that are to be provided in your Common Area Maintenance (CAM) charges and take advantage of buildingwide activities.



- Encourage other tenants in your building to participate in your greening initiatives.
- If you are renovating or expanding an existing space or constructing a new office, be sure to ask your architect about green building options and installation of energy- and water-saving devices.

Resources

- ABA Website for Sustainable Law Offices: www.abanet.org/publicserv/environmental/sustainable_law_office.shtml
- EPA's Green Power Partnership Program: www.epa.gov/greenpower/
- EPA's Wastewise Program: www.epa.gov/wastewise/
- EPA/DOE's Energy Star Program: www.energystar.gov/

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READY RESOURCES

- Take the ABA-EPA Law Office Climate Challenge! Visit the Section of Energy, Environment, and Resources at www.abanet.org/environ/climatechallenge/.

ABA Membership

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Free and discounted CLEs are also available to YLD members. Whether you attend free CLEs in person at YLD meetings around the country or you choose to receive other discounted benefits, your ABA membership can pay for itself through the CLE programs alone. Other professional resources include free ethics advice through the ABA ETHICSearch service.

Additional consumer benefits, discounts, and preferred memberships exist for ABA members with a variety of national hotels, rental car services, computers, legal publications, and mail products.

Most importantly, as a member of the ABA, you are a part of one of the nation's leading professional organizations. Your membership unites you with a wide network of American and international leaders. We are pleased to include you in this national legal community. For more information, please visit www.abanet.org or the YLD's homepage at www.abanet.org/yld.

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READY RESOURCES

- Find out what ABA entities provide for new lawyers with The New Lawyer Roadmap—www.abanet.org/yld/benefits/roadmapglance.pdf

Verdict in on Jury Deliberations

By Shari Seidman Diamond

Jury deliberations are the subject of much speculation, in part because they are not generally open to scrutiny. An opportunity to study what juries do behind closed doors arose when Arizona courts wanted to evaluate an innova-

tion that allows jurors to discuss the case among themselves during breaks in the trial—a contrast to the usual practice of admonishing jurors to refrain from discussing the case until the end of the trial. The Arizona Judiciary permitted



a team of researchers—Shari Diamond, Neil Vidmar, and Mary Rose—to conduct an experiment. With the consent of the

litigants, attorneys, and jurors, we assigned trials to either allow or not allow juror discussions. We were also permitted

to videotape the deliberations of the fifty civil juries involved. Participants were promised that the tapes would be viewed only by the researchers and only for research purposes. The results of the evaluation revealed some of the advantages (e.g., jurors found expert testimony easier to understand) and no evidence of the disadvantages (e.g., plaintiff advantage, premature closure) that proponents and critics of the discussions inno-

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Quick Writing Tips from One of the TYL Editors

By Colin Darke

I am not a great writer, but I seek advice from good writers and try to improve my writing on a regular basis. As an editor of *The Young Lawyer*, I come across writers that make some of the same mistakes that I have made in the past. I have compiled a short list of some common writing tips that can benefit any writer.



1. Avoid Lazy Sentences

When writing, review your sentences to make sure that each sentence is clear and contributes to the overall piece.

You can accomplish this goal by keeping the subject and verb of a sentence close together. The following is an example of a lazy sentence: "The court in viewing all of the evidence in the light most favorable to the Defendant should still rule in the Plaintiff's favor." Fourteen words separate the subject "the court" from the weak verb "should still rule." You could revise the sentence as follows: "The court should rule in the Plaintiff's favor, even when viewing the evidence in the light most favorable to the Defendant." The revised sentence is easier for the reader to digest. The writer tells the reader upfront what is happening in the sentence, and the comma breaks up an otherwise long sentence.

You can also avoid lazy sentences by using the active voice. Writing in the passive voice is problematic because the emphasis of the writer's sentence is usually misplaced. For example, "The house was abandoned by the Defendant on April 7, 2001." You could revise this sentence as follows: "The Defendant aban-

doned the house on April 7, 2001." In the revised sentence, the active voice places the emphasis on the actor and creates a more forceful sentence. (If you represented the Defendant referred to in the preceding sentence, however, you might want to use the passive construction as a way to downplay the Defendant's role in the action.)

2. Watch Your Words

Avoid words if you are not positive of the word's proper usage. Two sets of words that writers often misuse are (1) *effect* and *affect* and (2) *than* and *then*.

Effect is usually used as a noun, meaning "result," as in the sentence, "The effect of his actions on the Plaintiff was immeasurable." *Effect* is often used more vaguely to refer to a distinct impression that something gives: "She said she was going to take the matter into her own hands, or something to that effect." The only time *effect* should be used as a verb is when it means "to cause something to come into being": "The goal of the organization is to effect change."

Affect is usually used as a verb to mean "to influence" or "to act on": "The partner's harsh criticism did not affect the young associate." The only time *affect* should be used as a noun is to mean a feigned (an outdated usage) or subjectively experienced emotion: "His reactions and affects to the painting were dramatic."

Writers often confuse *than* with *then*, or they mistype the proper word and then miss the error when editing. *Than* is used for comparison and *then* is used as a reference to time. For example, "Tom is taller than Harry" in contrast to "Harry drove to the house and then parked his car in the garage."

3. Revise, Revise, Revise

A first draft is just that, a *first*

draft. Always find time, whether it is weeks, days, or even minutes, to revise your writing. You should also read the piece aloud to detect errors or awkward sentences. Additionally, make sure that you vary the sentence lengths and paragraph lengths. Readers appreciate variety; there is nothing more off-putting than a solid page of text. Finally, ask

someone else to read your work. A person looking at your work for the first time will notice grammatical errors, awkward sentences, and typos that you may have missed.

Your writing is a reflection on you, so take the time to make sure it is your best. Please e-mail me any writing tips that you have found helpful, and I will

compile them for a future article.

Colin Darke is a student in the Graduate Program in Banking and Financial Law at Boston University School of Law. He can be contacted at colindarke@gmail.com.

READY RESOURCES

■ *Garner on Language and Writing*. PC # 1610057. 2007. To order online, visit www.ababooks.org.

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www.abanet.org/cle/programs/t08slb1.html

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ABA YLD MIDYEAR MEETING | LOS ANGELES, CA

For more details, visit www.abanet.org/yld/midyear08/home.shtml

- Get more for your membership: Learn about what ABA entities have to offer.
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APR. 16-19, 2008

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Jury Deliberations

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vation had predicted.

In subsequent research, Mary Rose and I analyzed this unique data set to map the contours of jury deliberations. The picture of the civil jury that emerges is both more and less orderly than previous accounts would suggest. Jurors actively process the information they receive in the courtroom and apply common-sense norms of behavior to evaluate the reasonableness of behavior and sort out competing claims. They regularly draw on their personal histories and experiences to determine both the acceptable standard of

behavior (e.g., what would constitute negligence) and what behavior actually occurred.

Previously neglected in research based on jury simulations and posttrial interviews is the importance of trust in juries' decision making. Recognizing the adversarial nature of the courtroom setting, jurors scrutinize the sources of information they receive, looking for cues that witnesses and attorneys can be trusted. Jurors evaluate not only the credentials and experience of expert witnesses, but also the content of their testimony. They rely on and test each other's impressions, often correcting errors in recall and inference. Juries also struggle with some of the judgments they are asked to make and the tools, such as jury instructions, they are expected to use to reach those judgments. Generally jury interactions are not part of a mechanical decision-making process but rather a series of negotiations that can be both messy

and creative.

A common assumption about juries is that jurors begin deliberations with strong verdict preferences that are expressed in an immediate vote. After the vote reveals what the majority prefers, the majority then browbeats or otherwise persuades the minority to come around to its verdict. Actual civil jury deliberations are far more complicated. Deliberations rarely begin without disagreement and ambiguity. Early calls for votes are common, but most of them do not result in a clear majority or unanimous verdict. Moreover, voting occurs on a variety of different topics, not just on liability and damages. For example, the jurors may vote on whether they agree that there was an actual obstacle on the road at the time of the accident, as the plaintiff claimed.

The biggest challenges for juries are expert testimony and jury instructions, and both attract substantial effort and attention from the jurors. The

most persuasive experts are clear communicators who do not obfuscate, either intentionally or inadvertently. Similarly, the jury instructions that provide the most effective guidance during deliberations are those that present information clearly and in an orderly way.

The jury is both a cultural icon and favorite scapegoat, sometimes put on a pedestal and other times charged with being biased and incompetent. The real jury revealed in our analyses of the approximately 80,000 comments jurors made during these deliberations is more accurately described as an active problem solver, vigorously engaged in grappling with the conflicting evidence to produce a plausible account of the events that led to trial.

Shari Seidman Diamond is Howard J. Trienens Professor of Law and Professor of Psychology at Northwestern University School of Law in Chicago and a Senior Research Fellow, American Bar Foundation. She can be contacted at s-diamond@law.northwestern.edu.

DEADLINE TO FILE YLD 2008-09 NOMINATIONS

The ABA Young Lawyers Division will elect its officers and other representatives at the ABA Annual Meeting on Aug. 12, 2008, in New York City. The officers and representatives being elected include the Chair-Elect, Secretary-Treasurer, Speaker, Clerk, one delegate to the ABA House of Delegates, the representative to the ABA Nominating Committee, and one of the Division's candidates for young lawyer member-at-large on the ABA Board of Governors. The deadline for nominations by written notice to the Secretary-Treasurer is the Assembly's adjournment at the Midyear Meeting on Feb. 9, 2008, in Los Angeles. The applicable bylaws and guidelines relating to eligibility and nomination are available at www.abanet.org/yld. For more information, please contact Acting Secretary-Treasurer, Jay Ray, Moseley Law PC, Ste 400, 3878 Oak Lawn Ave., Dallas, TX 75219. Phone (214) 525-3902, E-mail ray@moseleylaw.biz. Petitions to run for the above positions should be filed via e-mail with Acting Secretary-Treasurer Jay Ray at the e-mail address above; Staff Director, Jill Eckert McCall at mccallj@staff.abanet.org; and Assembly Speaker Deb Smith at dasmith@gordonrees.com.

⇒ Hear more from this author and earn Free CLE credits at the "How Civil Juries Really Decide Cases" program, Friday, Feb. 8, 2008, at the ABA YLD Midyear Meeting in Los Angeles—Co-Sponsored by the American Bar Foundation. Visit www.abanet.org/yld/midyear08/ for more information.