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What It Takes to Mediate

By Geoff Drucker

PART 1 IN A 2-PART SERIES. NEXT MONTH: "MEDIATION ADVOCACY: THE VIEW FROM ACROSS THE TABLE"

The paradox of lawyering is that to do it well you have to be able to see all sides of an argument, but your job is to explain why only one side makes sense. Mediators help litigants develop a broader and more balanced view of their dispute and craft solutions all can live with. No wonder many lawyers enjoy stepping into this neutral role. Want to join the club? Start with assessing your career goals and personal strengths.

Why do you want to mediate?

- For an interesting challenge?
- For a break from the daily grind of zealously advocating one point of view?
- For a career change?
- To enhance your communication and conflict resolution skills?
- You got it confused with medi**tation**?

The clearer the picture you have of what you want, the easier it is to figure out how to pursue it. If you are uncertain about your goals, determine what you need to learn or experience in order to clarify them.

Can you think like a mediator?

Perhaps the greatest value mediators can add to a negotiation is their mindset: warmth and humor, optimism and persistence, open-mindedness, problem-solving skills, and creativity. Mediators help parties think expansively about options for achieving goals and interests. They also help parties assess options objectively. This is called reality testing. It means probing all sides and elements of the key issues. Ask yourself the following questions to help decide whether mediation is right for you:

- Can you remain neutral about how a contested matter is discussed and resolved?
- Do you have the maturity, life experience, and outlook to empathize with people who have very different backgrounds, personalities, and points of view?
- Can you remain calm, cool, and collected in an emotionally charged atmosphere?
- For the types of cases you wish to mediate, do you have the degree of subject-matter expertise that the parties require?

Many first-rate lawyers with successful careers may not possess the characteristics and skills necessary to mediate.

Where do you start?

Unless you have outstanding credentials or stellar contacts, as a new attorney you will find it very hard to break into the private mediation market. And bear in mind that very few lawyers who can compete in this market mediate full time because it takes a large volume of cases to keep busy. Teams of litigators may rack up hundreds or thousands of billable hours on a case that a mediator helps resolve in ten or twenty billable hours.

More realistic options are court-sponsored mediation programs, community mediation centers, and local, state, and federal government programs for resolving administrative cases. Many advocacy groups (e.g., for people with physical and mental disabilities, special education needs, the elderly, and victims of domestic abuse) know about local mediation programs that are accessible to their constituents. Religious programs on peace-building and justice are another fertile source of opportunities and leads. Academic programs in

alternative dispute resolution or conflict resolution should have contact information for local mediation providers.

Some mediation programs will train and mentor you in exchange for a commitment to mediate a certain number of cases or be available to mediate for a specified period of time. The better funded programs pay a stipend per case.

Since the supply of available mediators has expanded greatly in recent years, many programs now require you to obtain training elsewhere. An expensive CLE or commercial course is unnecessary. Many community mediation centers, university conflict resolution programs, and religious organizations provide high-quality training at modest prices. Courses typically last twenty or forty hours, and the best ones teach primarily through role plays. Look for classes with a small trainer-to-trainee ratio.

From your training program or other contacts, seek an experienced mediator to mentor you. Lawyers typically learn to try cases by second-chairing. Mediators learn by co-mediating. Some training courses offer co-mediation opportunities as a follow up. If an attorney at your firm or agency mediates, ask if you can tag along as an observer. After one or two observations, you should be ready to play a progressively more active role.

If you want people to think of you as a mediator, start walking the walk now. Apply creative problem-solving skills in your everyday practice of law—and life. Will this help you become a mediator? Maybe. Will it make you a better lawyer? Definitely.

Geoff Drucker teaches mediation and negotiation at George Washington University Law School and George Mason University and mediates, trains, and consults with The McCammon Group in Washington, D.C. He can be contacted at GDrucker@mccammongroup.com.

READY RESOURCES

- *Creative Problem Solver's Handbook for Negotiators and Mediators*, Vols. One (PC# 4740060) and Two (PC # 4740061). 2005. Section of Dispute Resolution.

To order online, visit www.ababooks.org.

The Business Case for the Recruitment and Retention of Minority and Women Attorneys

By Dana M. Douglas

Many major law firms have embarked on strategic diversity planning and have allocated many dollars to increasing the recruitment and retention of minority and women attorneys. These efforts have transpired, in large part, in response to client calls to strengthen law firm diversity and a general feeling in the legal profession that diversifying the law firm environment is the right thing to do.

In 1999, chief legal officers from 500 corporations, including the Sara Lee Corporation, signed a document that became known as "Diversity in the Workplace: A Statement of Principle" (www.acc.com/public/accapolicy/diversitystmt.html) and pledged to consider diversity as a factor when selecting and hiring outside counsel.

In spring 2004, these corporations renewed their commitment to promoting diversity in the legal profession by signing on to another document entitled "A Call to Action: Diversity in the Legal Profession" (www.acc.com/resource/v5748). "A Call to Action" encourages corporate legal departments and law firms to increase the numbers of women and minority attorneys hired and retained. These corporations pledged an ongoing commitment to "make decisions regarding which law firms represent [them] based in significant part on the diversity performance of the firms." With this document, the corporations also declared: "We further intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse." These companies understood that if they are more

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United States Supreme Court Wrap-up 2007

By Colin Darke

The honeymoon is over for U.S. Supreme Court Chief Justice John G. Roberts. In his inaugural 2005–06 term, Chief Justice Roberts touted that he would push for unanimity in the Court's decisions, and he was able to deliver many 9–0 decisions. The Court's 2006–07 term, however, provided many contentious 5–4 decisions, which revealed more of the true makeup of the Roberts Court. Below are a few cases highlighting the Court's new dynamic.

One for Congress

The 2006–07 term established Justice Kennedy as the Court's crucial swing vote. One of this term's cases where Justice Kennedy's powerful vote swung more to the conservative side is *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007).

Gonzales was one of the Court's more controversial cases as it dealt with the contentious issue of a woman's reproductive rights. In 2000, the Court struck down a Nebraska ban on "partial-birth" abortion in *Stenberg v. Carhart*, 530 U.S. 914 (2000). The *Stenberg* Court held that the Nebraska statute was unconstitutional because (1) it did not have an exception to the ban on "partial-birth" abortions for situations involving the preservation of the mother's health and (2) it placed an undue burden on a woman's ability to choose an abortion by prohibiting more than late-term "partial-birth" abortions.

In response to the *Stenberg* decision, Congress enacted the Partial-Birth Abortion Ban Act of 2003. In *Gonzales*, certain physicians sued then-United States Attorney General Alberto Gonzales to prohibit enforcement of the Act. The physicians argued that the Act was unconstitutional on its face similar to the way that the Nebraska statute in *Stenberg* was unconstitutional. Writing for the majority, Justice Kennedy quickly distinguished the language of the Partial-Birth Abortion Ban Act from the language used in the Nebraska statute. The Court found that the Act, unlike the Nebraska statute, was not void for vagueness because it prohibited a physician from "knowingly perform[ing] a partial-birth abortion . . . that is [not] necessary to save the life of the mother." The Act also explicitly defined the prohibited procedure. The Act's scienter requirement and explicit definition saved it from the vagueness problem of the Nebraska statute because a doctor "of ordinary intelligence [has] a reasonable opportunity to know what is prohibited."

For a more in-depth U.S. Supreme Court summary and to learn about two other 5–4 decisions, check out TYL *online:* www.abanet.org/yld/publications.html

The Court further reasoned that the Act was in line with its previous *Planned Parenthood v. Casey* and *Roe v. Wade* decisions in balancing a woman's reproductive rights against a state's rights in protecting the health, safety, and welfare of its residents. The Court explained that the Act did not regulate first-trimester abortions, but rather a specific second-trimester procedure referred to as "intact dilation and evacuation." The Court also asserted that the Act was not overly broad because it recognized a state's interest while not imposing an undue burden on a woman's right to an abortion.

One for Big Business

Justice Kennedy was also the crucial swing vote in several Supreme Court decisions this term that some commentators felt favored big business. One such case was *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007), in which a retailer sued a manufacturer for violating federal antitrust laws by "refusing to sell to retailers that discount its goods below suggested prices." The retailer and the lower courts relied on the Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 31 S.Ct. 376 (1911), for the *per se* rule that such vertical pricing agreements violated Section 1 of the Sherman Act.

The manufacturer argued that the *Dr. Miles* decision was outdated and that the common law rule of reason for antitrust cases should be applied to its case. The lower courts relied on the *per se* rule and would not consider any procompetitive justifications for the manufacturer's policy.

Writing for the majority, Justice Kennedy sided with the manufacturer. The Court overruled the *Dr. Miles* decision and sided with the manufacturer's argument that the decision was outdated and not in line with contemporary economic realities. The Court held that the rule of reason, which requires a fact finder to weigh "all of the circumstances," including "specific information about the relevant business" and "the restraint's history, nature, and effect," was a more appropriate recognition of the underlying antitrust policies. Specifically, the Court held that courts should have the ability to distinguish between those restraints that are anticompetitive and those that may be procompetitive and should not be handcuffed to a *per se* rule.

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.

The Business Case

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diverse, they are better able to survive in a global marketplace. Law firms that are able to assist corporate in-house counsel with this challenge are in the best position to maintain working relationships with these corporations.

So why are some law firms more successful in recruiting and retaining minorities and women attorneys than other firms? The secret is essentially the same for successfully retaining and recruiting others:

1. Commitment from firm leadership. There must be a commitment to investing the time and resources necessary to hire, mentor, and retain lawyers of diverse backgrounds and recognition that diversity efforts only begin and not end with recruitment.

2. An environment that supports diversity and respects all members of the firm. Everyone at the firm is responsible for creating an environment where all attorneys, including women and attorneys of color, feel as though they are valued instead of isolated and excluded. When these attorneys are comfortable with their work environment, they can become your best marketing plan for achieving a successful diversity plan.

3. Good relationships between firm recruiting teams and law schools and diverse bar associations. Some of the best and brightest minority and women associates are found outside the traditional on-campus interview process. In an age where diverse students are seen as a top commodity, it is important for law firms to start early and to be proactive in their approach to identifying and building relationships with diverse students.

4. A strong mentoring program. Mentors help associates, regardless of their backgrounds, understand both the formal and informal paths to success at a firm and can provide meaningful feedback on substantive work product and practice development to foster associates' professional growth.

5. Challenging work for minority and women associates. Key decisions are made in law firms every day that have a lasting impact on the careers of associates. There must be a top-down commitment from partners within the firm to be inclusive when thinking about staffing cases and who will attend the client meetings. A concentrated effort to provide an environment where all attorneys learn and grow through challenging assignments, client contact, coaching, and honest feedback is very important to attorney retention.

The progress of a firm's diversity plan can be measured by its impact on the bottom line. Measurements of success can be identified through lower turnover, which decreases the costs of training. Studies show an associate's departure can cost a law firm up to $415,000 in recruiting, training, salary, overhead, severance, and other costs. Success can also be measured by the amount of work attained from those corporations who seek out firms with strategic diversity plans. Diversity is a win-win situation for all involved parties. Not only do law firms, attorneys, and clients stand to gain from the wealth of perspectives and inherent goodwill that strategic diversity plans offer, but law firms are increasingly recognizing the business case made by consciously choosing to have a diverse workforce.

Dana M. Douglas, a partner in the New Orleans law office of Liskow & Lewis, PLC, practices commercial litigation and is a member of the firm's diversity and recruiting committees. She can be contacted at dmdouglas@liskow.com.

READY RESOURCES

- *Miles to Go: Progress of Minorities in the Legal Profession*. 2005. PC # 4520014. Commission on Racial and Ethnic Diversity in the Law Profession.
- V*isible Invisibility: Women of Color in Law Firms*. 2006. PC # 4920037; (also available as downloadable PDF: PC # 4920038PDF). Commission in Women in the Profession.

To order online, visit www.ababooks.org.

Gone but Not Forgotten: Leaving Your Job, Not Your Professional Reputation

By Jamie Rene Abrams

While you may have selected a date to depart your current job, your professional reputation will live on with your clients and coworkers long after you leave. Leaving your legal job is not as simple as cleaning out your desk; you have ethical and professional responsibilities to your clients. You also need to preserve the professional reputation that you have worked to develop. These four guidelines can help:

1. Maintain a client-centered approach by transitioning the relationship, not just the files.

- Approach your job transition with the same high standard of client service you maintained in your practice.
- Communicate with your supervisors to ensure that you or your supervisors notify your clients of your departure appropriately and promptly.
- Think both prospectively and retroactively in assessing client needs. Assess the tasks that clients will need completed in the short- and long-term future.
- Anticipate historic work that might resurface to save valuable time and money.

2. Develop and follow a departure plan by identifying and anticipating outstanding tasks. Develop a written plan or outline to communicate your transitional efforts, solicit input on your plan from your supervisors, and organize your time and tasks. Include:

- the names of your assigned matters and clients
- descriptions of your involvement in these cases
- other attorneys and personnel involved in these matters
- any outstanding tasks or upcoming deadlines and the approximate time commitment involved. If known, identify the attorney who will handle the tasks.
- a summary of historic tasks or work product that the client may revisit
- the location(s) of relevant files or materials

To discuss more issues like this, attend the "Young Lawyers: The Next Generation" Summit at the ABA Midyear Meeting in Los Angeles on Friday, Feb. 8, 2008.

3. Transition your caseload collaboratively by being proactive, communicating with your colleagues, and using available resources.

- Do not rely on your colleagues to transition your work for you. Rather, take an active role in identifying the tasks and proposing transition steps; then follow through on those steps.
- Your transition does not have to be a solo act. Use the resources available through your administrative support, human resources, and records-management personnel. They have assisted other departing employees and can offer valuable insight and suggestions.
- Circulate your departure memorandum to your supervisors and team members to ensure that you have captured all relevant information and completed all tasks.

4. Always offer professional courtesies by expressing appreciation and staying positive. Approaching your departure with the highest standard of professionalism will set the tone with coworkers, communicate your appreciation to your supporters, and enable a long-term relationship with your employer.

- A heartfelt "thank you" can go a long way in expressing your gratitude for supervising attorneys who have taught you valuable skills, assistants who have helped you manage your workload, and clients who have given you professional opportunities and business.
- Many employers offer exit interviews and other formal and informal structures to communicate constructive feedback to employers. Stay positive and know your audience. These conversations are rarely appropriate or effective at the peer or casual level.

The above framework will help ensure a smooth transition of your work product and client obligations, leaving a positive, final impression with your employer.

Jamie Rene Abrams, an instructor in the Legal Rhetoric Program at the American University, Washington College of Law, can be contacted at jabrams@wcl.american.edu.

YLD CALENDAR & CONFERENCES

DEC. 18, 2007
INTRODUCTION TO FAMILY LIMITED PARTNERSHIPS ☎
www.abanet.org/cle/programs/t07ifl1.html

JAN. 10, 2008
THE BASICS OF LIFE INSURANCE PLANNING ☎
www.abanet.org/cle/programs/t08tbl1.html

FEB. 7, 2008
STARK LAW BASICS ☎
www.abanet.org/cle/programs/t08slb1.html

FEB. 7-9, 2008
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.
- Engage in dialogue about critical young lawyer issues: Attend the **"Young Lawyers: The Next Generation"** Summit.
- Shape YLD Policy: Play a role in the YLD Assembly.
- Help local first responders: Do pro bono work by implementing Wills for Heroes.

FEB. 15, 2008
DEADLINE TO APPLY FOR ABA YLD 2008–09 APPOINTMENTS
www.abanet.org/yld/appointments/

APR. 16-19, 2008
ABA YLD SPRING CONFERENCE IN CONJUNCTION WITH THE ABA SECTION OF LITIGATION AND ABA DAY| **WASHINGTON, D.C.**
For more details, visit www.abanet.org/yld/spring08/home.shtml
- Expand your network: Meet 300 young lawyers from around the country.
- Sharpen your legal skills: Earn CLE credits.
- Discuss how the profession can become more inclusive by attending the **"Diversity: The Next Generation"** Summit.
- Help local first responders: Do pro bono work by implementing Wills for Heroes.

Visit the ABA YLD Calendar for additional information:
www.abanet.org/yld/meetings.html

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Visit *TYL* online at www.abanet.org/yld/publications.html.

Easy Restaurant Reservations While Traveling

By Kim R. Jessum

Weary business travelers, you no longer need to be stuck in your hotel rooms eating overpriced room-service food alone. Now you can find the perfect restaurant before you even arrive or make a reservation from the comfort of your hotel room to avoid waiting in those long lines. All you need is your computer and Web sites like the following ones the next time you travel.

OpenTable.com™
(www.opentable.com)—For restaurant reservations at over 6,000 restaurants in the United States, Canada, United Kingdom, Hong-Kong, Japan, and Mexico. Registered users receive reward points for each reservation that can be redeemed for a certificate to use at participating restaurants. Bonus points are also available for reserving at certain designated times. Reservation information may be downloaded into your Outlook calendar and sent to others via an invitation. If there is no availability at a restaurant at the requested time, you may search for the next available opening; this is particularly useful for those new, popular restaurants that have minimal availability.

It is important to cancel or change a reservation by calling the restaurant or through the OpenTable Web site if you cannot honor the reservation. Your account will be deactivated automatically if you accumulate four no-show reservations within the same twelve-month period.

Savvy Diner
(www.savvydiner.com)—For restaurant reservations in many U.S. cities (minimal participating restaurants). Gift certificates for participating restaurants may be purchased through Savvy Diner. Registration with the site is not required, but more personal information is required for each reservation. After you choose a restaurant, you must complete a reservation request at least twenty-four hours before the requested reservation time. Reservations are confirmed via email, fax, or phone.

Dinner Broker
(www.dinnerbroker.com)—For restaurant reservations in the United States and Canada. Dinner Broker also offers discounts, special offers, and discounted gift certificates for certain restaurants. Similar to OpenTable, points are awarded for reservations and for referrals to friends, but there are fewer participating restaurants. Points may be accumulated for a gift certificate to a participating restaurant. The search results on Dinner Broker are shown in a spreadsheet that indicates availability and discounts. Discounts of 10–30 percent are offered for reservations at off-peak hours. Reservations may be canceled on the site or by calling a customer service hotline. There are no posted penalties for "no shows."

If you are traveling for the holidays or just do not feel like cooking this holiday season, why not go online to make your holiday restaurant reservations? Many restaurants offer special holidays menus you can view online. But move quickly because they will book up fast.

Kim R. Jessum is of counsel at Stradley Ronon Stevens & Young, LLP, in Philadelphia working in the firm's intellectual property group. She can be contacted at kjessum@stradley.com.

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 Angles. 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.