

ACBA BENCH-BAR CONFERENCE

The Allegheny County Bar Association's Bench-Bar Conference is the Pittsburgh Legal Community's premier gathering of legal professionals.

The ACBA Bench-Bar Conference is a **members-only, adults-only** event.



JUNE 18 – JUNE 20, 2026

SEVEN SPRINGS MOUNTAIN RESORT



Friday, June 19, 2026

11:45 a.m.

ALTERNATIVE DISPUTE RESOLUTION COMMITTEE PROGRAM

1 Substantive credit

Wintergreen

Presented by the Alternative Dispute Resolution Committee

Mediation - Upping Your Odds of Settling



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Mediation - Upping Your Odds of Settling

Getting to a mediation is only half the battle. Learn how to get your case ready for one, understand the best methods to meaningfully engage in the process, and strategies for working with your mediator to maintain ongoing negotiations.

In a game show reality contestant format, the program will provide tips and best practices when preparing, attending, and settling your case, pre or post litigation, with a mediation. The program will be a question-and-answer format with audience input and presentation.

Speakers:

Frederick B. Goldsmith, Goldsmith & Ogradowski LLC

Meryl Macklin, Bryan Cave Leighton Paisner, LLP

Linda A. Michler, ADR Offices of Linda A. Michler

Chad Shannon, Shannon Law Group LLC

SPECIAL THANKS TO MARY KATE COLEMAN, DARTH NEWMAN AND WHITNEY HUGHES.

ADR Committee Bench Bar Program Q & A as of May 2, 2026

1. Mediation preparation - What is the most important thing to do before a mediation?
 - a. Have a pre-mediation call with the neutral.
 - b. Prepare your client
 - c. Know your settlement parameters
 - d. Identify all persons who have the authority to approve a settlement and have them available on the day of the mediation.
 - e. Identify from your client's perspective what the client wants in a mediation settlement, what the insurance representative and any other party-in-interest wants.
 - f. all of the above
2. Strategies that do or don't work.
 - a. What is the worst thing a plaintiff can do in a mediation?
 - i. Increase their demand
 - ii. Walk out
 - iii. Make a ridiculously high demand
 - b. What is the worst thing a defendant can do in a mediation?
 - i. Leave the person who controls the money back in the office
 - ii. Insult the plaintiff
 - iii. Walk out
 - iv. Refuse to make an offer because the demand is too high
 - c. What is the best thing a defendant can do in a mediation?
 - i. Make a conciliatory statement at the outset
 - ii. Refuse to make any opening statement as it will be confrontational
3. What are private meetings between the parties and the mediator during mediation called?
 - i. Caucuses
- b. What is the name for the event that occurs when the parties are unable to agree to settle the case?
 - i. Impasse
- c. What is a writing by the mediator signed by the parties with the basics of an agreement?
 - i. Memorandum of Understanding
4. Pet peeves

- a. What do mediators hate most?
 - i. Argumentative statements by attorneys
 - ii. Attorneys who do not know the facts of their case
 - iii. Bringing the wrong person to the mediation
 - iv. All of the above
 - v. None of the above
- 5. Upping your odds of settling
 - a. What's the best way to get a case settled?
 - i. Keep talking
 - ii. Ignore the posturing
 - iii. Nod and smile no matter what!
- 6. When drafting a confidential mediation statement for the mediator....it is better to honestly disclose your case's warts or to present a more "persuasive" version of the case/facts.
 - a). Honestly disclose
 - b). Never disclose and do a more "persuasive version"
 - c). Honestly disclose partly in a confidential mediation statement and partly in a pre-mediation conversation with the mediator.
 - d). None of the above
 - e). All of the above
- 7. When Plaintiff's counsel prepares a pre-mediation video of witness deposition excerpts or of a day-in-the-life of their client, and sends it with their demand to the Defense, and also the mediator, does that help the mediation process?
 - a). Yes
 - b). No
 - c) It depends

If answer c), (then ask why to the panel and the audience)?

8. How much time should you spend with your client preparing them for the mediation, whether they are an individual plaintiff or an experienced in-house counsel or insurance professional?

- a). Several days over a period of time.
- b) Four (4) hours or less
- c) Wait until the day of the mediation
- d) Don't prepare
- e) None of the above
- f) It depends

9. I am told by almost all mediators that a detailed but concise mediation statement is critical to effective mediations. It arms the mediator with what they need.

- a). True
- b) False
- c). Maybe
- d) A concise mediation statement and a pre-mediation discussion with the mediator works best

10. What does "Functus Officio" mean?

- a) Having performed one's office
- b) Your job as an arbitrator is done
- c) Your job as an arbitrator has just started
- d) b and c
- e) a and c

11. In arbitration, what does "Ex Parte Communication" mean?

- a). It is a communication that is made by the arbitrator with any party or representative outside the presence of all parties concerning the case.
- b) A communication that is forbidden in arbitration
- c) A communication that is forbidden in mediation
- d) A communication that is permitted in mediation.
- e) a, b and c
- f). a, b and d
- g) a and b only

12. Also, I know as a plaintiff's attorney, having a full authority discussion with my clients is key. When the things that I mention will happen then happen, it gives me credibility, which then helps me keep them in a reasonable range of authority. The best practitioners do this approach as it builds:

- a) credibility – clients trust your guidance
- b) emotional stability -fewer reactive decisions mid-mediation
- c)negotiation control – you can move within a defined range without renegotiating authority in real time
- d) All of the above

13. How many have this conversation with their clients (and insurance adjusters and necessary others) before the mediation? Is this customary practice and if not, why not?

14. An estimate based on typical practice patterns is that the top 15-20% of plaintiff's attorneys consistently have real authority conversations and prepare clients thoroughly. This is not because the attorney is a bad attorney. There are several reasons that partial conversations are more common and favored. What are some reasons?

(ask the panel and audience then show the following)

- a) fear of losing clients if expectations are lowered
- b) discomfort discussing risks, fees or net recovery
- c) lack of confidence in valuation
- d) simply poor process discipline by the attorney

15). Should Plaintiff's counsel serve the Defense with a written pre-mediation settlement demand and, if so, how far ahead of the mediation? How detailed should it be? What should it cover?

16). When drafting a confidential mediation statement for the mediator....it is better to honestly disclose your case's warts or to present a more "persuasive" version of the case/facts.

Mary Kate Coleman, Esq.

Ms. Coleman is a civil litigation attorney, mediator, and arbitrator with Mary Kate Coleman LLC in Pittsburgh. She received her B.A. from Vanderbilt University in 1979 and her J.D. from St. Louis University in 1982, where she was a senior staff member of the St. Louis University Law Journal. In 1983, she received her M.B.A. from the University of Pittsburgh. She is admitted to the practice of law in Pennsylvania, West Virginia, and Ohio. Over the years, Ms. Coleman's practice has included the defense of personal injury, toxic tort, asbestos, medical malpractice, employment, product liability, insurance sales practices, civil rights, and other types of civil litigation. Additionally, she received certificates from Harvard Law School's Program of Instruction for Lawyers for completing its Mediation Workshop and Negotiation Workshop. Ms. Coleman serves as a mediator and arbitrator privately, for various organizations and the courts. She is the Past Chair of the Allegheny County Bar Association Alternate Dispute Resolution Committee and serves on the Allegheny County Bar Association's Special Fee Determination Committee. She is the former editor of the Pennsylvania Bar Association Alternative Dispute Resolution Committee's newsletter, *Resolution*; was the chair of the PBA ADR Committee from 2020-2021 and was the co-chair of the PBA ADR Committee from 2021-2025; and she served as the former chair of the Pennsylvania Bar Association ADR Committee's Court-Annexed Mediation Programs Subcommittee. Ms. Coleman was appointed to the Pennsylvania Joint State Government Commission's Advisory Committee on Alternative Dispute Resolution. She recently served as a member of the Allegheny County Mediation Task Force. Ms. Coleman is the recipient of the Pennsylvania Bar Association ADR Committee's 2022 Sir Francis Bacon Award. In 2025, she was the recipient of the Mediation Council of Western Pennsylvania's Conflict Resolution Day Award. She is the author of many published articles and a frequent speaker on the subject of ADR.





Frederick B. Goldsmith, Esq.

Frederick B. Goldsmith is an attorney and mediator with Goldsmith & Ogradowski, LLC in Pittsburgh. He is a formally trained mediator, approved to serve as a mediator, arbitrator, and early neutral evaluator by the U.S. District Court for the Western District of Pennsylvania. He is also listed as a qualified mediator by the West Virginia State Bar and serves as a member of the Alternative Dispute Resolution Committees of the Allegheny County Bar Association and the West Virginia State Bar, and the Arbitration and ADR Committee of the Maritime Law Association of the United States. He serves as a volunteer mediator of prisoner civil rights cases for the U.S. District Court for Western District of Pennsylvania and of civil cases for the Allegheny County Court of Common Pleas. He has practiced law for 36 years, including service as law clerk to a U.S. District Judge, vice president and general counsel of a leading harbor and oceangoing tugboat operator, defense counsel for Fortune 500 companies, and as counsel for workers who have suffered severe, typically career-ending injuries. His undergraduate and law degrees are from Tulane University. He is licensed in Pennsylvania, West Virginia, Ohio, Texas and Massachusetts, and is admitted to several federal trial and appellate courts around the country.

Meryl Macklin, Esq.

Meryl has been litigating and trying complex commercial cases for over 40 years and has been mediating commercial disputes, including contract and business tort disputes, for the last 20. Her litigation practice focuses on M&A and corporate governance and shareholder disputes. In all areas of her practice, Meryl is persistent and listens. Her approach to dispute resolution has been part of her practice for decades, whether in working with transactional attorneys to resolve disputes short of litigation or to avoid them in the first instance, or in working with clients to develop targeted strategies that minimize legal expenses while achieving the clients' goals. Meryl has been a member of the Mediation Panel of the Northern District of California since 2006 and of the Western District of Pennsylvania Panel since 2025. She attended mediation training at the Harvard Negotiation Project and at the Northern District of California. Meryl is available for Zoom mediations worldwide and for in-person mediations in California, Pennsylvania, Ohio, Delaware, Maryland, New York, New Jersey, Washington, DC, and portions of Virginia.





Linda A. Michler, Esquire

Linda is a nationally recognized arbitrator and mediator with decades of experience resolving complex commercial and governmental disputes. As the founder of her own practice, she has successfully conducted more than 2,000 mediations, arbitrations and ADR proceedings nationwide, frequently serving as panel chair and guiding parties toward practical, durable outcomes.

Ms. Michler's legal career spans both the public and private sectors, including roles with a major law firm, a global data and risk management company, and the U.S. Small Business Administration. She also owned and managed a law firm for over 20 years, where she handled transactional matters and high-stakes litigation at the trial and appellate levels across state, federal, and administrative courts. Today, she focuses exclusively on mediation, arbitration, and early neutral evaluation, helping businesses and law firms efficiently resolve disputes involving contracts, finance, employment, and healthcare. Known for her strategic mindset, active listening, and creative problem-solving, she brings a resolution rate exceeding 90% to even the most complex, multi-party matters.

Linda is a member of the National Academy of Distinguished Neutrals, serves on the CPR Panel of Distinguished Neutrals, and a Fellow of the American Bar Foundation. She is a respected educator, author, and frequent speaker on ADR topics presenting CLE programs nationwide.



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Darth Newman, Esq.

Owner of the Law Offices of Darth M. Newman LLC

Darth is a skilled trial attorney and certified mediator with more than a decade of litigation experience in complex commercial and plaintiff's side whistleblower cases. He has tried shareholder disputes, fraud, insider dealing, and fiduciary duty matters worth millions of dollars. He has also represented whistleblowers from across the country helping to shed light on all manner of fraud against the government from dangerous healthcare systems, devices, and doctors to government contracting and loan fraud.

Darth is a two-time past Chair of the Allegheny County Bar Association Professional Ethics Committee and is Chair of the Federal Court Section. He is also a member of the Pennsylvania Bar Association's Professional Ethics and Federal Practice Committees. Darth serves as a Hearing Committee Member for the Disciplinary Board of the Supreme Court of Pennsylvania.





Chad P. Shannon, Esq.

After working in two larger firms in the Pittsburgh area, Chad recently started the Shannon Law Group to provide more personalized services to his clients. He believes in helping the most vulnerable in our society.

Over the past twenty years, Chad has handled a wide variety of cases in Pennsylvania and West Virginia, including nursing home and hospital injuries, civil rights, medical malpractice, premises liability, auto accidents, slip and falls, products liability, oil and gas injuries, asbestos cases, and railroad collisions. He's obtained significant results for many clients throughout his career, including several multi-million-dollar settlements.

He has participated in hundreds of mediations at both the state and federal levels in Pennsylvania, West Virginia, and Ohio.

Chad serves on the Allegheny County Bar Association Alternative Dispute Resolution and Civil Litigation Section committees.

Mediation preparation, part one: The plaintiff’s perspective

By Frederick B. Goldsmith

The Allegheny County Court of Common Pleas has a new mandatory mediation rule, Rule 212.7, effective with the May 2023 trial list, requiring, with certain exceptions, the parties complete a mediation *any time* at least 45 days before your case’s trial term begins. The U.S. District Court for the Western District of Pennsylvania has had in effect since 2006 a mandatory early ADR program, described in Local Civil Rule 16.2 and the Court’s ADR Policies and Procedures, requiring the parties complete an alternative dispute resolution session, which can be a mediation, within 60 days after the Initial Scheduling Conference. This deadline is subject to adjustment by the presiding judge. This article describes my recommendations for best practices for mediation preparation from the *plaintiff’s* perspective. In the next issue of the *Lawyers Journal*, I will present best practices from the *defense* perspective.

1. Make sure it’s the right time to mediate. As to an Allegheny County case, if you and defense counsel agree to waive mediation or one party can show “good cause” to be excused by motion from mediation, then make these decisions early on. As to a WDPA case, if circumstances change, rendering the court-ordered deadline too soon to meaningfully mediate, then one or both parties should file a motion under Rule 3.5 of the ADR Policies and Procedures. The point is you should be discussing with opposing counsel *well in advance of mediation* what *both* sides will need in the way of



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written discovery and deposition testimony to evaluate the case sufficiently to have a productive mediation. If the timing is not right for *everyone*, then come to a consensus on what all counsel will be doing in response. If it can be avoided, do not waste your, your client’s, and the mediator’s time and energies and your client’s money moving ahead with a mediation that is doomed to fail.

2. Agree on a mediator early to get on their schedule. Half or full day? Popular mediators’ schedules fill up far in advance. Discuss with opposing counsel who would be a good choice to mediate your case, and then try to get on that mediator’s schedule. Unless your case is of modest value, opt for a full day mediation. The mediation process, like any significant negotiation, takes time. Give the mediator the time he or she needs to help everyone work through all the issues of your case so

you can maximize the chances of achieving a settlement.

3. Consider a focus group. As plaintiff’s counsel, if your case has significant value, consider focus grouping your case. Focus groups can provide you and your client with insights into the strengths, weaknesses and value of your case, as well as help inform strategy and theme decisions.

4. If an MSA is needed, have it performed at least a month ahead of time. If your client has a serious injury which will require future medical care, prescriptions and/or medical appliances, commission an outside Medicare Set Aside Analysis and provide to the firm preparing it all the medical records and other data they need to perform the analysis. If there are no such future medical needs, have your client’s treater(s) put that in writing.

5. Is a lifecare plan needed? If your client’s injuries are significant and will require expensive, long-term, future medical care, home caregivers, prescriptions, home alterations, prostheses and/or medical appliances, retain a lifecare planner and obtain their written analysis, which will help inform case value and factor into your settlement demand.

6. Determine if there are outstanding spousal or child support obligations, tax, healthcare, disability insurance and/or other liens. Find out this information well ahead of time. Each case is unique, so I cannot list here all the potential liens plaintiff’s counsel must consider but ensure you and your client are aware of *all* liens, and all outstanding obligations, including

an MSA if one will be required, so your client knows how much money from any given dollar value settlement will have to be paid to others or set aside and thus be untouchable.

7. Make sure your client knows what their net will be. Send your client an up-to-date case costs sheet well before the mediation, and include anticipated costs through mediation, any bills in the pipeline, such as court reporter and expert invoices, their estimated share of the mediator’s fee, a discussion of all liens and, if applicable, the cost to fund and administer an MSA, along with your attorney’s fee. Provide to your client well before the mediation all the information and numbers they will need to determine how much money they will net from any given settlement offer.

8. Videotape all depositions. Witnesses can die or disappear when you need them most. A lawyer’s or another person’s reading or quoting from a deposition transcript in a demand email, or at trial, does not have the same impact of a video deposition clip. Strongly consider incorporating clips from video depositions into a pre-mediation video “story” to send to the other side. If the case does not settle, you will have the videos for presenting testimony of unavailable witnesses and impeaching witnesses at trial.

9. Prepare a pre-mediation video. If your client’s case has significant value, strongly consider preparing a pre-mediation video, which you will share with defense counsel, who can then share the video with those with

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ultimate settlement authority. This enables the decisionmakers on the other side to see and hear how your client and other key witnesses will come across in the courtroom if the case does not settle.

10. Prepare a timely and credible demand email or letter. Allow at least two weeks, ideally even longer, before the mediation, to enable defense counsel to evaluate the demand for the defendant or insurer, and to request or be provided with settlement authority. Be direct, professional, reasonable and collegial. Show the other side you know your case and theirs, and how and why you will be prepared to try it absent an appropriate settlement. Address your case's strengths, and also frontally address its weaknesses. If you have prepared a pre-mediation video "story" or summary of key deposition testimony, send it along with the demand. Make a reasonable demand, one which takes full account of the facts, law, witnesses, evidence and venue.

11. Prepare a credible and helpful confidential mediation position statement. Include along with your position statement your demand letter or email and, if you have one, your pre-mediation video. Send all this to the mediator at least by their deadline. Even though the WDPA ADR rules do not *require* position statements, I believe they're essential. Write succinctly. Make it easy for the mediator to grasp the high points of your case. Make it apparent you have looked at your case dispassionately, that you have considered your case's strengths, weaknesses and your opponent's defenses, and explain why

you believe you would prevail at trial and for an amount at least approximating your demand. If the law is specialized, provide to the mediator a primer on applicable law. If the operations or equipment involved in your case are unique, explain such. Include photos or illustrations. If there are important expert reports or deposition excerpts, photos, videos, or documents, send them, or excerpts of such, to the mediator. But only send to the mediator what they will need to appreciate your key evidence. Do not overwhelm the mediator. You will have ample time at the mediation to explain what other evidence will be available for trial.

12. Fully prepare your client and other key family members. Explain the mediation process early on to your clients, ideally during an in-person meeting, so they will be acclimated to the process and in a position to calmly evaluate offers and ultimately decide if the best offer achievable at the mediation makes sense for their particular circumstances. Warn them that the defense's initial offers may seem incredibly low, and not to get upset. Explain to your clients this is a *negotiation* and they have to maintain patience and emotional intelligence. Make sure *you* know your client's settlement expectations, *and that such are reasonable*. If you sense your client's settlement expectations are unreasonable, tell them so, and why, in a compassionate but firm manner, well before the mediation.

13. Fully prepare the lienholder for the mediation. Keep the lienholder(s) updated on the progress of your case and ask they keep you apprised of the lien amount. If you plan to ask the

MEDIATION PREPARATION
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lienholder to reduce their lien by more than a contract, policy, or applicable law requirement, prepare the lienholder(s) for this well ahead of time. If the case will not settle if they insist on recovering their full lien, make sure the lienholder(s) know this. Ensure the lienholder(s) will either attend the mediation or be readily available during it.

14. Plan for you and your client(s) to attend the mediation and to stay for as long as it takes. Mediations can fail when all the required players have not committed the *full* day or half day to the process. Make sure you and your clients have cleared your schedules to allow for an undistracted mediation.

15. Have a pre-mediation call with the mediator. Unless your client’s case is simple, involving well-traveled law and non-complex facts, ask the mediator for a brief *ex parte* phone call a day or so before the mediation, to cover logistics, the gist of your case and/or any issues unique to your case. The WDPA’s ADR rules require such conferences and many mediators believe such conferences enhance the chances for a successful mediation. If you will need the mediator’s help explaining to your client their case’s value or lack thereof, address this during a pre-mediation call with the mediator. Let the mediator know what they are walking into. Good mediators appreciate candid and well-prepared lawyer advocates and well-prepared clients.

16. Whether the case is going to settle, or not, be prepared for trial. Ensure you are ready or will be ready to try your case. Cases settle when the other side knows you are or will be prepared to try your case. Try to avoid

walking into a mediation *having* to settle.

17. Bring or have access to key file materials at the mediation. Often at mediations the mediator will walk into or click into (if it’s a remote mediation) your room asking about a particular record or telling you and your client(s) that the defense says a witness testified a certain way or what a document states. Bring your laptop to in-person mediations and have it or a flash drive loaded with key file materials such as deposition transcripts, key documents, medical records and expert reports.

18. If the case settles at mediation, don’t leave the mediation without a signed term sheet or another enforceable written contract. People’s memories can fade or differ. Put the agreements reached at mediation in writing, or at least get and save assenting emails, before everyone leaves, with all lead lawyers signing and the signatures of your client(s).

Conclusion – Prepare for mediation with diligence and attention to detail. It will take a lot of work. Put in the necessary time. Cover all the necessary bases. Just like preparing for a trial, you maximize your chances for a successful outcome at mediation *only* if you and your client(s) are fully prepared. ■

Frederick Goldsmith, licensed in PA, WV, OH, TX, and MA, is a former federal judicial law clerk, has practiced in the roles of civil defense, in-house and plaintiff’s counsel for 32 years, and has tried personal injury, property damage and insurance coverage cases on both sides of the docket. He is an attorney and formally trained mediator with Goldsmith & Ogradowski, LLC (www.golawllc.com), approved to serve

as a mediator, arbitrator and early neutral evaluator by the U.S. District Court for the Western District of PA. He is also listed as a qualified mediator by the West Virginia State Bar and serves as a member of the ADR Committee of the ACBA, the W.V. State Bar and the Maritime Law Association of the U.S.

SE BILL REDEFINES “EMPLOYEE”

Mediation preparation, part two: The defense perspective

By Frederick B. Goldsmith

Allegheny County Local Rule 212.7, effective with the May 2023 trial list, requires, with certain exceptions, mediation of cases at least 45 days before their trial term begins. I described in the last issue of the *Lawyers Journal* best practices for mediation preparation from the *plaintiff's* perspective. Here are my recommendations for mediation preparation from the *defense* perspective. These tips are equally applicable to mediation of cases pending in the U.S. District Court for the Western District of Pennsylvania, which since 2006 has had a mandatory early ADR program, described in Local Civil Rule 16.2 and the Court's ADR Policies and Procedures. The WDPA requires the parties to complete an alternative dispute resolution session, which can be a mediation, within 60 days (subject to adjustment by the presiding judge) after the Initial Scheduling Conference.

1. Make sure it's the right time to mediate. Allegheny County Local Rule 212.7(4) states as to good faith participation in mediation: "The Calendar Control Judge may, upon motion, impose such sanctions as are deemed appropriate against counsel and/or the parties for failure to comply with this rule in good faith." So, for an Allegheny County case, if you and plaintiff's counsel agree to waive mediation (Rule 212.7(1)(b)) or one party can show "good cause" to be excused by motion from mediation (Rule 212.7(1)(a)), then make these decisions early on and file the



Frederick Goldsmith

appropriate motion. As to a WDPA case, if circumstances change, rendering the scheduling order deadline too soon to meaningfully mediate, then counsel should file an ideally joint motion under Rule 3.5 of the ADR Policies and Procedures. Section 2.8 of the WDPA's ADR Policies and Procedures, entitled "Good Faith Definition," provides in part, "If a party is attending a mediation session with the intent not to make any demand or offer of settlement, or if they intend to wait until the disposition of certain motions to engage in settlement discussions, they shall explicitly inform the mediator and all other parties in writing no later than 15 calendar days prior to the mediation session." So, in either state or federal court, to avoid the risk of drawing a motion for sanctions for failure to mediate in good faith, if it is your client's or its insurer's intent not to

offer any sums at mediation, or to not offer any or significant sums pending certain events which will not occur by the time of the mediation, then you should definitely let opposing counsel know this and decide whether a motion should be filed to attempt to reschedule the mediation for a more appropriate time.

2. Agree on a mediator early on and try to get on their schedule. Half or full day? Discuss with opposing counsel who would be a good choice to mediate your case, and then try to get on that mediator's schedule. Unless the case is obviously of modest value, opt for a full day mediation. The mediation process, like any significant negotiation, takes time. Be patient. Give the mediator the time he or she will need to do their job.

3. Ask plaintiff's counsel for a timely demand. Ask plaintiff's counsel to provide to you a demand letter or email, with supporting facts describing its basis, at least two weeks, ideally longer, before the scheduled mediation, so you and your client and/or the insurer can understand counsel's valuation of their case.

4. Evaluate the case for your client and/or your client's insurer. Most corporate clients and insurers require a thorough evaluation of a case well before any mediation or settlement conference. My standard practice as a defense lawyer was to prepare a written pre-mediation evaluation addressing:

- The venue, including the trial judge and the venire;
- A brief overview of the case, including key facts, claims, and defenses;

- The case's procedural posture, including any pending motions and their likely outcome, remaining pre-trial deadlines, and the trial date;

- Liability, including a summary of my investigation and the significant facts, documents, photos, videos, deposition testimony, and expert reports and deposition testimony, if any, which have been adduced in discovery, a brief summary of applicable law, followed by my prediction in percentage terms of a plaintiff's or a defense verdict, including likely jury findings for comparative negligence, if applicable, and why;

- Damages, including, in a personal injury case, a discussion of the elements and range of damages, in dollars, a reasonable jury will assess for each of the following elements:

- Lost past earnings and loss of future earning capacity (with discussion of any plaintiff and defense vocational and economic expert reports);
- Past and future medical expenses, including discussion of the plaintiff's injuries, medical status, future care needs, treating physician opinions on causation and nature and extent of injury, and, if obtained, the defense medical examination or records review report(s), and the weight you believe a jury will accord such;
- Past and future pain, suffering, mental anguish, and physical disfigurement;
- Any loss of consortium/loss of society claim(s) jury value and basis;
- Prejudgment interest/delay damages; and

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CRIMINAL LAW SYMPOSIUM
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practicing trial attorney since 1997. Presently, he is running for Judge of the Court of Common Pleas of Allegheny County and has been endorsed by many groups as well as individuals.

1:00 - 1:30 p.m. – Indirect Criminal Contempt Proceedings (0.5 Substantive credit)

The Hon. Nicola Henry-Taylor will discuss how indirect criminal contempt proceedings are conducted in the Court of Common Pleas. The presentation will focus on the role of the defense attorney and the defenses.

The Honorable Nicola Henry-Taylor is a judge in the Family Division in the Allegheny County Court of Common Pleas. The Honorable Henry-Taylor was the named partner of the Nicola Henry-Taylor Law Office which dealt with family law as well as criminal law. Judge Henry-Taylor was a former assistant district attorney in the Office of the District Attorney of Allegheny County. Judge Henry-Taylor is an active ACBA member and, among other things, was a former chair of the ACBA Judiciary Committee. Judge Henry-Taylor was the Director of Diversity at the Thomas R. Kline School of Law of Duquesne University and had received the Carol Los Mansmann Award in 2019 given by the ACBA Women in the Law Division.

1:40 - 2:40 p.m. – New Case Law (1 Substantive credit)

Lisle T. Weaver and Justin D. Okun will discuss new criminal case law from the past year. They will discuss how it relates to the Criminal Division in the Allegheny County Court of Common Pleas. Participants will learn how these cases have changed the law

and will affect the practice of law in criminal court.

Weaver is a named partner at the law firm of Farrell Weaver & Okun. Weaver handles all types of state criminal cases from prior to arrest to post-conviction appeals. Weaver is a member of the ACBA Publications Committee. Weaver has published criminal law articles in the ACBA’s *Lawyers Journal* as well as the Pennsylvania Bar Association Quarterly. Weaver graduated from Thomas R. Kline School of Law of Duquesne University.

Okun is a named partner at the law firm of Farrell Weaver & Okun. Okun practices in the Criminal Division and Orphans’ Division where he has dealt with a variety of cases from preliminary hearings to the Pennsylvania Supreme Court. Okun has published criminal law articles in the ACBA’s *Lawyers Journal* and the Pennsylvania Bar Association Quarterly. Okun is a member of the ACBA Publications Committee. Okun graduated from the University of Pittsburgh School of Law.

2:50 - 3:50 p.m. – Nuances of Criminal Law (1 Substantive credit)

Jennifer Popovich will lead a presentation concerning the nuances of the law in criminal court. Participants will join in a discussion about the ins and outs of criminal court and the details to be aware of that might affect their case in court.

Popovich is an Assistant Public Defender in the Butler County Office of Public Defender handling capital and non-capital trials. Popovich has worked in private practice in the Law Office of David Shrager. Popovich was the First Assistant District Attorney at the Beaver County District Attorney’s Office. Popovich has handled many serious trials and has over 20 years of experience.

For more information or to register, visit [ACBA.org/Criminal-Symposium2023](https://www.acba.org/Criminal-Symposium2023). ■

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– Plaintiff’s settlement demand and my opinions on it and its basis.

- A conclusion, applying the liability percentage ranges to the ranges of damages, arriving at (i) a range of damages, if any, the jury is likely to assess; (ii) a reasonable range of settlement values, (iii) continued defense costs through trial, and (iv) a request or recommendation for settlement authority.

5. Ensure the appropriate personnel will be attending the mediation with you and with full settlement authority. Allegheny County Local Rule 212.7(2) states: “Except by agreement of all parties, all parties with a financial interest and all non-parties with a financial interest (such as insurers) shall attend mediation with full authority to settle the case.” The WDPA’s ADR Policies and Procedures state at Sections 2.7(A)(1) and (2) that corporations and other entities must be represented by “a decision maker(s) (other than outside counsel) who has full settlement authority and who is knowledgeable about the facts of the case” and that government entities must be “represented by a person who has, to the greatest extent feasible, full settlement authority, and who is knowledgeable about the facts of the case, the governmental unit’s position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements.” As for insurers, Section 2.7(C) states that “Insurer representatives, including, if applicable, risk pool representatives,

are required to attend in person unless excused under paragraph D below [“personal attendance would impose an extraordinary or otherwise unjustifiable hardship”], if their agreement would be necessary to achieve a settlement.”

6. Prepare a credible and helpful confidential mediation position statement. Send this to the mediator at least by their deadline. Even though the WDPA ADR rules do not *require* position statements, I believe they are essential. Write succinctly. Less is more. Draft your position statement to help the mediator “get” your assessment of the case. Make it apparent you have looked at the case dispassionately, that you have considered the strengths and weaknesses of both the plaintiff and defense sides of the case, and candidly explain your conclusions. If the law is specialized or the operations or equipment involved in the case are unique, briefly explain such. Send the mediator important photos or illustrations, excerpts of deposition transcripts, expert reports, short videos, and/or key documents, but do not overwhelm the mediator with materials.

7. Have a pre-mediation call with the mediator. Unless the case is simple, involving well-traveled law and non-complex facts, ask the mediator for a brief *ex parte* phone call a day or two before the mediation, to cover logistics, the gist of your view of the case, and/or any issues unique to the case. The WDPA’s ADR rules require a pre-mediation conference call, and many mediators believe they, or *ex parte* calls with counsel and parties, enhance the chances for a successful mediation. If you will need the mediator’s help explaining to your client or the

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insurer the value of the plaintiff’s case in this region, tell this to the mediator in a private phone call. Let the mediator know what they are walking into. Find out if the mediator intends to have counsel make opening statements (I am not a fan) or if they will just facilitate a “meet and greet” session atop the mediation (I think these can be helpful in humanizing the participants).

8. Fully prepare your client representative and/or insurance claims representative. Explain the requirements of local rules as to attendance and with “full settlement authority,” and what to expect in terms of style and format from the mediator. If you sense or learn your client’s or the insurer’s settlement authority is far too low for the case, have a frank discussion with them about this. If appropriate, discuss with opposing counsel why you may need to postpone the mediation. Avoid a situation where you, your client, and/or its insurer may be accused of not mediating in good faith.

9. Will any lienholder(s) attend or be available during the mediation? Liens are typically plaintiff’s counsel’s problem. But it makes sense to ask opposing counsel if they have been in touch with the lienholder(s) and if they will either be attending or readily available by phone during the mediation. You could also ask plaintiff’s counsel if a Conditional Payment Letter has been secured from the Centers for Medicare & Medicaid Services, if a Medicare Set Aside is going to be required, and if so, if they have obtained an analysis of such. The idea is not to be nebbby, but to make sure

neither side will be hit with an avoidable obstacle to a fruitful mediation.

10. Plan for you and your client(s) and representative(s) to attend the mediation and to stay for as long as it takes. Mediations can fail when all the required players have not committed the *full* day or, if applicable, half day to the process. Make sure you, your client representative, and the insurer’s claim representative have cleared your schedules so you can each fully participate in the mediation through its conclusion.

11. Whether the case is going to settle, or not, be prepared for trial. I firmly believe preparing for mediation means preparing for trial. Mediation, if successful, will simply allow all parties to cease *further* trial preparation including outlays for experts, depositions, travel, attorney’s fees, etc.

12. Bring or have access to key file materials at the mediation. To be able to quickly respond to questions from the mediator, perhaps those raised by opposing counsel, about, for example, the testimony of a witness or the contents of a key document, have your physical or electronic case file readily available during remote mediations and bring your laptop or iPad to in-person mediations and have it loaded with key file materials such as deposition transcripts, key documents, medical records, and expert reports.

13. If the case settles at mediation, do not leave the mediation without a signed term sheet. You need an enforceable written contract. People’s memories can fade or differ. Put the key terms of the agreements reached at mediation in writing while everyone is still at the mediation, with all lawyers and clients signing, or at least get and save assenting emails and/or

photos or scans of signatures on the mediation term sheet (in the case of a remote mediation).

Conclusion – Mediations have proven to be highly effective in resolving cases before trial, but your chances of resolving a case at mediation will be overwhelmingly improved if the lawyers on all sides have taken all appropriate steps, well ahead of time, to fully prepare themselves, their clients, and those affording settlement authority for this important event. ■

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ADR professionals as both mediators and arbitrators in the same matter

By Linda A. Michler

Before determining any processes in a two-step mediation and arbitration (med-arb), start with contemplating whether it is a good idea for you as the ADR professional to assume the role of mediator and then as arbitrator. The objectives of the parties and perhaps even the ADR professional are to save time and the costs of educating another neutral. The next time you or counsel proffers the idea of a med-arb, think carefully about the inherent drawbacks. Then make a decision. I almost always decline.

Private caucusing in a mediation is usually the norm, with the mediator adjusting his or her approach to what the parties need at a specific time. In other words, first developing trust with the mediation participants, particularly the clients, diagnosing what is impeding progress, and determining how that impediment might be overcome in order to progress. This approach helps the mediator be impartial and honest – someone confidences can be shared with – and also provides private and valuable information that can provide settlement alternatives. Mediators use the private caucuses to learn the parties' case strengths and weaknesses in greater detail than might be provided in pre-session submissions or conferences with counsel. They also allow the mediator to play devil's advocate to conduct reality testing and to challenge factual and legal positions, sometimes aggressively.

Arbitration is an adjudicative process that relies upon neutrality and objective procedural fairness. The procedural rules may be more relaxed than court; the principle of searching for the truth is not relaxed. It remains the foundation of the process and procedure. *Ex parte* contact is prohibited. Any communication that may happen must be conducted in front of the other party. No one wants untested and unchallenged evidence to potentially influence the arbitrator.

If the mediator has had private conversations with a party, there is simply no way to protect the disclosing parties' confidences and the integrity of the arbitral process. The mediator inevitably has learned information, without opposition, that likely colors the impression of the case. Mediators are human. Even worse, if a party has decided beforehand that it will not settle and wants to arbitrate no matter what, the opportunity for mischief is



Linda A. Michler

great. Private sessions can be used by a disingenuous party to influence the mediator/future arbitrator, knowing that the other side cannot challenge unless the disingenuous party has permitted dissemination of the private information. As neutral and fair as one might want to be, these *ex parte* communications necessarily risk preconceived bias in the subsequent arbitration.

The mediation process is inimical to a fair arbitration. Many mediators decline as a general rule. However, there are a few exceptions to this general rule. Before any part of a mediation begins, discuss whether the parties might want to do a step-up process. Full disclosure of the risks, in writing and in detail, likely are required under ethical rules and as a matter of prudence. Explain the reluctance to mediate first and then arbitrate. Suggest the alternative of arbitrating first and then mediating after the evidence is presented but before an award is issued. This form of a stepped-up process can guarantee the certainty of a resolution while maintaining the integrity of both processes.

The process would work as follows: the arbitration proceeds to a conclusion in as streamlined a process as the parties feel comfortable using. At the conclusion of the presentation of the evidence and any closing arguments, the arbitrator would write a simple Award. The mediation would take place within a few days, no more than that. This gives the parties an opportunity to digest what happened in the arbitration. Next step, the mediation commences. Knowing that the outcome of the arbitration has already been determined but not revealed seems to

give the parties added incentive to reach a negotiated solution. Plus, the integrity of the arbitral process has been protected since the award was drafted before the mediation and its *ex parte* contact began.

Advantages of this step-up process are that the parties are only hiring one neutral. The presentation of the evidence and argument in the arbitration has allowed for the ADR professional's education about the legal issues and strengths and weaknesses of each side's case, saving time that would otherwise be expended if mediation were conducted first. Most importantly, the parties have been ensured of a fair process that has not been corrupted by accidental or intentional contamination from disingenuous statements made by a party in a prior mediation. Of course, during the arbitration and the mediation process the neutral must be careful not to reveal, by body language or word, the decision set forth in the final award.

Another exception to a mediator's general disinclination to mediate and then arbitrate would be in those instances in which the parties included in their settlement term sheet or agreement that the mediator be engaged again if an unexpected dispute arises, such as sometimes happens when the final version of the settlement agreement is being negotiated. Accepting a mediation engagement when the matter is intended to re-settle

a case that everyone thought was settled simply does not create the ethical dilemmas that a mediation-arbitration does.

Whether online or in person, the combined process of an arb-med can be beneficial in certain matters. Just make sure the process is structured properly and in advance. Think carefully the next time the idea of a mediation – arbitration is discussed. The cost savings may not be worth it. ■

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A lawyer's obligations when advising an organization about conduct that may create legal risks for the organization's constituents

By Linda Michler

Formal Opinion 25-514 issued Jan. 8, 2025, by the American Bar Association (ABA) addresses the lawyer's professional obligations when engaging with nonclient constituents of a client organization. It builds upon the principles outlined in an Upjohn Warning and ABA Formal Opinion 491 (2020), emphasizing the importance of clarifying the lawyer's role in representing the organization rather than its individual constituents. The new Opinion underscores the need for attorneys to take reasonable steps to prevent or address any misunderstandings these constituents may have regarding the lawyer's representation.

The Opinion is particularly relevant in the context of complex transactions that carry significant regulatory implications. These transactions often involve not just the organization but also the business executives and board members who negotiate, approve, and implement them. Crucially, the guidance also applies to in-house counsel, who may face the daily challenge of constituents perceiving them as their personal legal advisors.

The central professional responsibility highlighted in the Opinion is to avoid situations where organizational constituents mistakenly believe that they can rely on the lawyer's advice as if the lawyer represents them personally. This policy goal formalizes and expands upon the existing practice of many attorneys to ensure clarity regarding the lawyer's role.

Earlier formal ethics opinions have clarified a lawyer's role as an advisor in various contexts. They recognized that a key aspect of this role is to help clients comply with legal requirements, which involves guiding clients in identifying and responding to legal risks. ABA Formal Opinion 491 (2020) explained that assisting in suspicious transactions is not competent if a reasonable lawyer, driven by serious doubts, would have refrained from providing assistance or would have investigated further to address those concerns. However, the Opinion also emphasizes that lawyers and clients are not required to avoid all legal risk.

Overview

Formal Opinion 514, is entitled "A Lawyer's Obligations When Advising an Organization About Conduct that May Create Legal Risks for the Organization's Constituents." It is premised on the understanding that when advising an organization, lawyers (inside and outside) necessarily provide their legal advice through organizational constituents, e.g., employees, officers, or board members. It recognizes that there will be situations when the organization's decisions about its future actions may have legal consequences for its constituents who will be acting on the organization's behalf, including the constituents through whom the lawyer provides advice to the organizational client.

The Opinion addresses three particular situations where: (1) a lawyer – in-house or outside counsel – is giving advice to an organization client through a constituent about future action the organization may choose to take; (2) the lawyer knows or reasonably should know that the constituents are likely to have their own legal interests at stake – for example, where the lawyer is advising the organization about possible future conduct for which the constituents may be subject to personal civil or criminal liability; and (3) the lawyer does not intend to create a client-lawyer relationship with the constituent or otherwise to assume fiduciary or contractual duties to the constituent.

(ABA Formal Opinion addresses a lawyer's advice to an organization regarding future conduct. It does not address a host of other situations in which counsel for an organization interacts with organization constituents. Among other things, the opinion does not address when a lawyer speaks with an organization constituent in the course of conducting an internal investigation of alleged misconduct on the part of the organization or in the course of other fact gathering. Nor does the opinion address when an organization's counsel attends a deposition of an organization's constituent and counsel represents only the organization or counsel represents the organization and the constituent. Nor does the opinion address the possibility that an

organization's lawyer might give a legal opinion to a nonclient constituent of the organization.)

The Opinion points to two tiers of the Model Rules of Professional Conduct in support of its requirements. The first tier includes the general standard of competent representation under Rule 1.1, necessary communication under Rule 1.4, and candid advice under Rule 2.1. Where a lawyer (in-house or outside counsel) is providing advice to an organization client about future action of the organization, these three rules may require the lawyer to advise the organization when its actions pose a potential legal risk to the organization's constituents. That will be a fact-based determination.

The second tier includes Rules 4.1 ("Truthfulness in Statements to Others"), 4.3 ("Dealing with Unrepresented Person"), and 1.13(f) ("Explain Identity of Client"). When an organization's lawyer provides advice to the organization about proposed conduct that may have legal implications for individual constituents, the risk exists that the constituents through whom the lawyer conveys advice may misperceive the lawyer's role and mistakenly believe that the lawyer represents them, and as a result they can rely personally on that lawyer's advice. In such a situation, the Opinion interprets Rules 4.1, 4.3, and 1.13(f) as requiring the organizational lawyer to take "reasonable measures" to avoid or

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dispel constituents' misunderstandings about the lawyer's role.

Educating organizational leaders who may receive the lawyer's advice may establish a foundation from which, in the future, lawyers may be more successful in advising the organization on matters with legal implications for the organization's constituents. Care must be taken to ensure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that non-client constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Practical Observations

Lawyers should take the issuance of the Opinion seriously, even if they believe it simply formalizes their own practices. The Opinion recognizes a professional responsibility to educate. Attorneys, both in-house and outside counsel, should also recognize that the Opinion speaks to more situations than those that have traditionally given rise to Upjohn warnings (e.g., witness interviews of constituents).

Interestingly, the Opinion interprets the professional rules as requiring

"reasonable measures" to prevent a misunderstanding about the lawyer's role. Those may include reminders about the lawyer's role early and often during the attorney-client relationship, and not only at times when the parties are involved on projects that carry legal implications for leadership, line management, and others.

More to Consider

Most importantly, the Opinion recognizes that there may be more situations in which the board (and some members of management) seek their own counsel given the potential for adversity with management in particular scenarios.

The involvement of counsel to leadership team members or the board is likely to impact the time and cost associated with a particular strategy development. This goes back to the lawyer's duty to educate non-client constituents.

Perhaps the reminders may have the salutary compliance impact of making those constituents more alert to the legal risks associated with strategies and initiatives while

deciding to pursue a particular strategy or initiative.

Any notification regarding potential legal risks to non-client constituents is to be made to the organization, not directly to the implicated non-client constituents (likely to avoid any inference by the non-client constituents that the lawyer is advising them about their risks). In that same vein, and for a number of reasons, in-house counsel should be prepared to respond to these circumstances with a list of unconflicted counsel which list could be given to the non-client constituents without recommendation.

The Opinion does not prescribe a particular form by which any notification is to be made to the organization for the benefit of the non-client. Any notification should be reflective of the underlying facts and circumstances.

Conclusion

ABA Formal Opinion 514 (2025) serves as a reminder to lawyers about their professional obligations when advising an organization. By providing clear communication, particularly in situations where legal advice could expose constituents to personal legal risks, lawyers can ensure they maintain compliance with ABA guidelines and avoid potential ethical pitfalls. Attorneys should closely review the Opinion and tailor their approach to meet the requirements laid out in the guidance, ensuring they educate organizational leaders and constituents about the scope and limits of their legal representation. ■

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