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To Advocate or To Vent, that is the Question

Florida DRC Conference

ADR: Improving the Resolution of Civil Cases

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Disclaimer

The materials in this presentation are intended to provide a general overview of the issues contained herein and are not intended nor should they be construed to provide specific legal or regulatory guidance or advice. If you have any questions or issues of a specific nature, you should consult with appropriate legal or regulatory counsel to review the specific circumstances involved.

Fred E. Karlinsky

Fred E. Karlinsky is the Global Co-Chair of Greenberg Traurig's Insurance Regulatory and Transactions Practice Group. Fred has nearly thirty years of experience representing the interests of insurers, reinsurers, and a wide variety of other insurance-related entities on their regulatory, transactional, corporate and governmental affairs matters.

Fred has been recognized for his work in insurance law by *Best Lawyers* and *Chambers and Partners*. In addition to his role with Greenberg Traurig, Fred has been an Adjunct Professor of Law at Florida State University College of Law since 2008, where he teaches a course on Insurance Law and Risk Management. Fred currently chairs the Supreme Court Judicial Nominating Commission, which he has served on since 2014.

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Agenda

- Mediation Overview
- Tactics to avoid
- Productive behaviors


Mediation Overview

What is Mediation?

When parties are unwilling or unable to resolve a dispute, one good option is to turn to mediation. Mediation is generally a short-term, structured, task-oriented, and "hands-on" process.

Advantages to Mediation

- Less expensive
- Preparation can be simpler
- Quicker than litigation
- Parties can fully express themselves
- Relationship preservation
- Confidential
- Doesn’t provide punitive damages

Common Form of ADR

What Happens in Mediation?

Mediation sessions usually begin with the introduction of the mediator to the two parties. The mediator will provide procedural ground rules, such as making no interruptions when the other party is speaking.

The mediator will explain the mediation process including clarification of the issue of session confidentiality, securing agreement on time allocation and securing a commitment from the parties to seek resolution in good faith.

The mediator will then explain the role of the mediator -- to be an impartial facilitator, not an advocate or judge of either party, and to assist the parties in arriving at their own solutions.


Mediation and Lawyers

Attorney's Role

- They do not challenge or cross-examine the other party, spar with the other attorney or, in other ways, treat mediation like litigation.
- Attorneys maintain a supportive, cooperative demeanor and demonstrate commitment to the mediation process by words and behavior. They do not treat mediation as an adversarial process or as a means for finding the truth.

Attorneys and Mediation

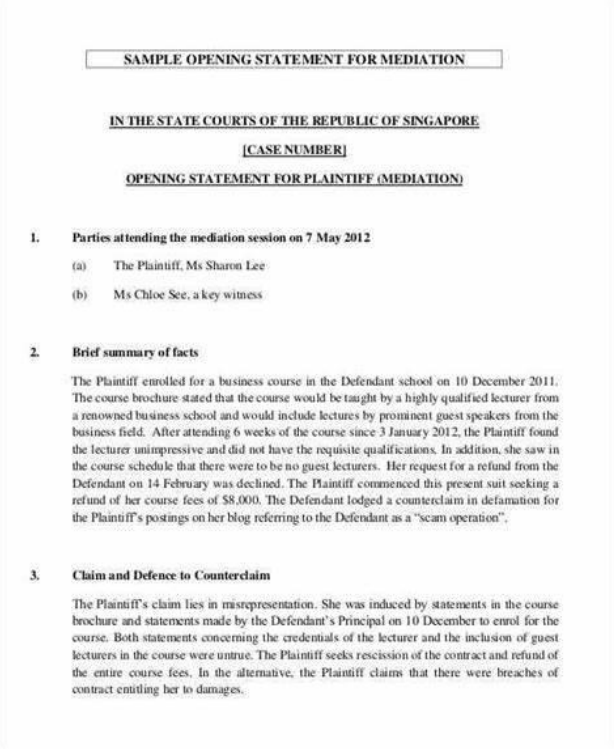
- Advocacy is never uncivil
- Lawyers encounter difficult personalities and bad behavior
  - Negotiations or contentious issues
- Protect yourself and your client without adopting bad behavior

Mistakes to Avoid and How to Fix Them

Confidentiality

- Information equals power
- Some lawyers will shy away from exchanging mediation statements
- Withholding information could be disastrous

Mediation Statements



SAMPLE OPENING STATEMENT FOR MEDIATION

IN THE STATE COURTS OF THE REPUBLIC OF SINGAPORE

[CASE NUMBER]

OPENING STATEMENT FOR PLAINTIFF (MEDIATION)

1. **Parties attending the mediation session on 7 May 2012**

   (a) The Plaintiff, Ms Sharon Lee

   (b) Ms Chloe See, a key witness

2. **Brief summary of facts**

   The Plaintiff enrolled for a business course in the Defendant school on 10 December 2011. The course brochure stated that the course would be taught by a highly qualified lecturer from a renowned business school and would include lectures by prominent guest speakers from the business field. After attending 6 weeks of the course since 3 January 2012, the Plaintiff found the lecturer unimpressive and did not have the requisite qualifications. In addition, she saw in the course schedule that there were to be no guest lecturers. Her request for a refund from the Defendant on 14 February was declined. The Plaintiff commenced this present suit seeking a refund of her course fees of $8,000. The Defendant lodged a counterclaim in defamation for the Plaintiff's postings on her blog referring to the Defendant as a "scam operation".

3. **Claim and Defence to Counterclaim**

   The Plaintiff's claim lies in misrepresentation. She was induced by statements in the course brochure and statements made by the Defendant's Principal on 10 December to enrol for the course. Both statements concerning the credentials of the lecturer and the inclusion of guest lecturers in the course were untrue. The Plaintiff seeks rescission of the contract and refund of the entire course fees. In the alternative, the Plaintiff claims that there were breaches of contract entitling her to damages.

Confidentiality: The Approach

Sharing information in advance is particularly valuable when facing a party with diffuse decision-making authority including insurance companies, government entities, large corporations with absent decision-makers, or coalitions of plaintiffs' counsel.

Insults

Types of attacks:

- Purposeful attacks
- Inadvertent attacks
- “Speaking the truth”/Allocating blame

Insults: The Approach

- Monitor language and statements
- Consider costs and benefits
- Choosing blame can come at the cost of a better deal

Insults: The Approach

- A party that is cooperative and cordial will do better overall in mediation than compared to a party that is overly competitive and insulting.

Arguments

Counsel often make ineffective mediation arguments, either because they are only focused on convincing the mediator, or because they do not appreciate the difference between the best arguments in court, and the best arguments in mediation.

Arguments: The Approach

The goals:

- Present convincing arguments
- Give the mediator ammunition to help you

Focusing Too Much on Advocacy

There is nothing necessarily wrong with lawyers advocating their client's position in mediation. However, many lawyers spend far too much time advocating legal positions to the disadvantage of both themselves and their clients.

Focusing Too Much on Advocacy: The Approach

Before arguing over perceived differences with opposing counsel, make sure that the difference in perception cannot be used to facilitate a deal.

No “They”

It is not uncommon to hear statements like: “they are here in bad faith to get free discovery,” or “they obviously don’t want to make a deal.” This assumes that everyone on the other side has the same motivations.

No “They”: The Approach

Use:

- Joint session
- Casual contacts
- Mediator

Lack of Preparation

By not being sufficiently prepared, you damage yourself in four important ways:

1. You do not give the mediator sufficient ammunition to present your position
2. You do not give the other side the impression that they will face a formidable adversary
3. You may miss ideas that would have allowed you to structure a better deal
4. You leave yourself in a worse position to assess whether any deal on the table is worth taking.

Lack of Preparation

It's too early

- If position is week, early mediation should be sought
- This is especially true when plaintiff's expenses (depositions, expert fees, other costs) might mount up and "wag the dog" or impede the resolution, or in the case of defendants who have "wasting policies" that eat into the overall amount available for resolution.

Lack of Preparation: The Approach

Spend time on mediation and opening statements. They help educate and show the other side that there can be a deal.

Skipping Opening Statements

Set the agenda
Lay out issues to be discussed

Skipping Opening Statements: The Approach

Consider:

- Your goals
- Who you are trying to persuade
- What will appeal best to your various audiences
- Use of language

Rush to Caucus

Many lawyers attempt to avoid joint sessions, because they are afraid of alienating opening statements, and they want to move as quickly as possible to seeing whether a deal is possible.

Rush to Caucus: The Approach

- Assess whether joint session or caucus is better
- Avoid alienating statements
- Set ground rules

Not Bringing in or Negotiating With All Interested Parties

Modern class-action cases often involve other plaintiff's lawyers bringing the same or similar suits. There can be reticence or even outright hostility to "copycat" suits pending in other jurisdictions, but mediation can help parties on the same side to reach agreement regarding terms and allocation between similarly-situated plaintiffs even where there is no resolution.

Not Bringing in or Negotiating With All Interested Parties: The Approach

For Plaintiffs:

Pre-mediation sessions can and should be conducted among plaintiffs separately to allow for the possibility that differences can be resolved and the plaintiffs present a unified front, avoiding interventions and objections that can delay or derail the settlement approval process.

For Defendants:

Pre-mediation sessions can be remarkably effective at reaching agreement on liability and allocation in a confidential setting and before the global mediation commences – where such issues can often overwhelm the successful resolution of a complicated, multi-party class action

Focus on Negotiating a Monetary Amount

By becoming solely focused on a dollar figure, and generally a dollar figure that attempts to approximate what would be awarded in court counsel can miss important opportunities and dangers.

Focus on Negotiating: The Approach

In every case, counsel should consider whether there are ways to achieve the goals of their clients, or to confer benefit on any of the parties, other than by simply negotiating a monetary settlement amount.

The Money

Beginning a numerical negotiation too far away from where you hope to end will usually lead the other side to begin with an equally extreme position, or to refuse to negotiate.

The Money: The Approach

Although there is no ideal number at which to begin a monetary negotiation, and many opening numbers can lead to roughly the same result, there are extremes that are generally counterproductive.

The First Offer

- A first offer is a message
- A bracket is a midpoint

The First Offer: The Approach

The norm in mediations is to make an offer far from where the deal will end.

Working with Numbers

A lack of facility with numbers can leave an attorney vulnerable to someone very comfortable with numerical calculations. It can lead you to accept deals you should refuse, and refuse deals you should accept. In complex cases, small errors in calculating damage numbers can be significantly magnified.

Working with Numbers: The Approach

- Ensure that a there is a lawyer who can work with numbers
- This lawyers will have the ability to perceive other available options that may otherwise be missed.

Fight Over Disagreements

Do not become so focused on winning the battle that you lose the war.

Fight Over Disagreements: The Approach

Before arguing over perceived differences with opposing counsel, make sure that the difference in perception cannot be used to facilitate a deal.

Assumptions

Just because something was done in the past, does not make it the best way to do it. More important, just because you did something before, does not convince anyone that you found the best way to do it.

Assumptions: The Approach

- Evaluate new approaches
- Justify your approach
- Do not get stuck in one paradigm

Strategies for Dealing with Bad Mediation Behavior

Maintain Your Standards

Keep in mind the saying, “When you fight with a pig, you both get dirty – but the pig likes it.” In other words, even if you win, you’ve lost by stooping to their lower level.

Don’t Fight Back Directly

- Difficult
- Less productive
- Hard to reach agreement

Don’t Fight Back Directly

Attack the problem, not the person

- Keep an objective problem
- Be hard on the problem
- Be soft on the person

Work Past the Anger

A deal can still be achieved if the parties can consent to a resolution that satisfies their interests better than having no deal.

Use the Mediator

- Can shift the negotiations
- Prevents manipulation

Give Feedback

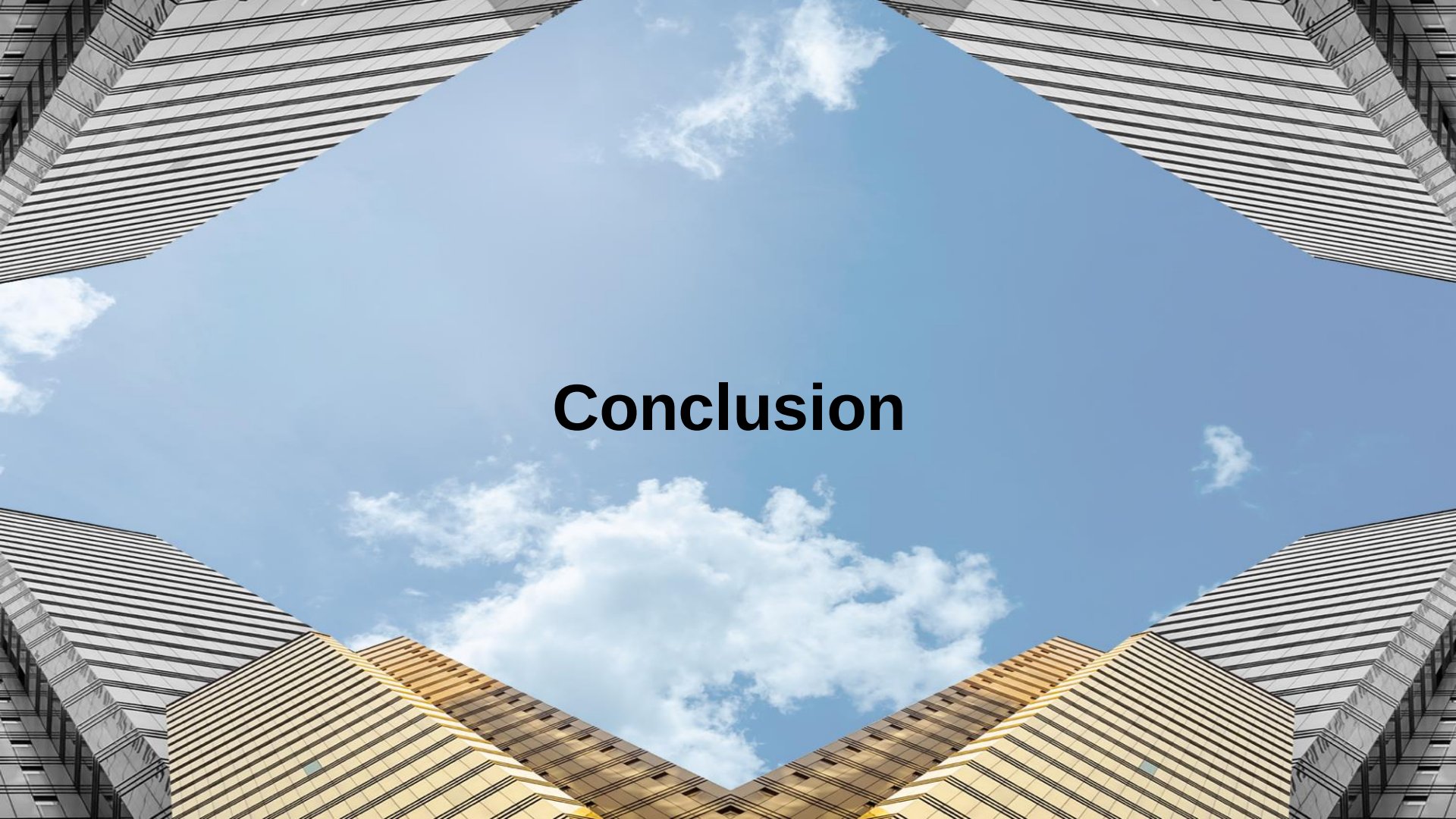
- Bad behavior is not always intentional
- Give feedback about specific behavior
  - Clarifies expectations

Advocate without being Adversarial

- Mediation is all about collaboration
- Advocate, but do not be adversarial
- Be professional

End the Mediation

Walking away is a last resort, but if the other side continues its bad behavior, it might be the only option. Importantly, the way you walk out makes a difference.


Conclusion

Mediation

- Mediation is a powerful tool
- Be collaborative and flexible
- Be aware of overaggressive behaviors
- Prepare your clients

Questions?

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Thank You for Joining!