

LAWYERS JOURNAL

PRACTICE AREA PROFILE: LABOR AND EMPLOYMENT LAW

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Need credits by the end of the month?

ACBA offering CLE sales in time for April compliance period deadline

By Brian Knavish

Rest easy, procrastinators.

If you need CLE credits by the April 30 compliance period deadline, the ACBA has you covered. The ACBA is offering a Live Video Replay Sale on Tuesday, April 25 all day in the Koppers Building where attorneys can earn one to six in-person credits in one day. Additionally, the ACBA will offer a sale on previously recorded CLEs online from April 26-30.

April 25

The wildly popular Live Video Replay CLE sales – held near the end of each CLE compliance period – have become a staple for many ACBA members, because these events allow attorneys to grab a bunch of CLE credits in one day, helping lawyers to stay in compliance and/or get a jump on the next compliance period.

The next installment will be held on Tuesday, April 25 in the Koppers Building. It will kick off with breakfast at 8:30 a.m. then programs will begin at 9 a.m. and continue throughout the day. During the event, the ACBA will offer Live Video Replays of 12 popular CLEs from the past year, six ethics and six substantive programs.

These CLEs “count” as live credits – not distance learning credits – and are available at \$25 per credit for members and \$35 per credit for non-members (a \$10 discount from the regular price).

Throughout the day, an ethics program and a substantive program will play simultaneously in different

rooms, allowing attendees to pick and choose from various CLEs of interest. Spend the whole day and earn up to six credits, or stop by at any point throughout the day and select programs individually. Breakfast and lunch will be provided.

To register or for additional details, visit ACBA.org/CLEsale. Walk-ins are welcome.

April 26-30

If you can't make it to the April 25 event, the ACBA also will offer a previously recorded CLE sale beginning April 26 and continuing through April 30.

During this sale, members can purchase select Previously Recorded CLEs at a discount and watch them any time from any location. These programs are “distance learning” programs, however, meaning they don't “count” as live programs. Attorneys can earn up to six distance learning credits per year.



The programs are available for just \$25 per credit for members (a \$10 discount). Nonmembers can watch for \$35 per credit.

For more info or to register, visit ACBA.org/PreviouslyRecordedCLE-Sale.

The Lineup

The schedule of available CLEs is the same for both sales. The lineup is as follows:

Substantive Programs

- Effects of Sentencing Law and the Need for Reform
- The Basics of Blockchain and Cryptocurrency
- Moving Beyond the Pandemic: Successful Alternative Work Arrangements
- Job Interviewing Best Practices: What Should Not Happen and What to Do if it Does
- The Future of Privacy in America
- Mediation 101

Ethics Programs

- Ethical Considerations for Lawyers Working Remotely
- Social Equity Consideration in the Expanding Cannabis Industry
- Understanding the Pennsylvania Disciplinary Board
- How to Comply with Rule 8.4(g) and Advance Professionalism
- Navigating Bias in the Profession as an Associate
- Depression and the Legal Profession ■

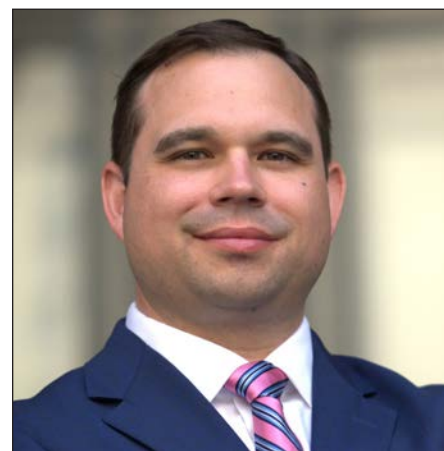
BENCH-BAR 2023 Back, and better than ever!

By Joe Froetschel

Sixty years ago, lawyers and judges sojourned together in the cozy confines of Seven Springs Mountain Resort to discuss the current state of the courts, address issues impacting lawyers and litigants, and network outside their cases and courtrooms. And with that, the Allegheny County Bar Association Bench-Bar Conference was born. Since then – aside from a two-year hiatus due to a global pandemic – members of the bench and bar have made the annual pilgrimage back to the Laurel Highlands to continue that tradition.

Over the years we have seen it all: the ACBA Players putting on Oscar(ish)-worthy performances, comedians, magic acts, famous speakers, Judges Livingston and Justin Johnson consistently winning door prizes and Judge Manning singing “Friends in Low Places” into the wee hours of the night. There have been constants: engaging CLEs, karaoke stars in the making and fiercely competitive golf games; along with – at least in terms of its long history – new events like CJE, sporting clays, axe throwing and yoga. But above all, and for more than half a century, the Bench-Bar Conference has brought us together not only as colleagues, but as friends. It has fostered new acquaintances and solidified life-long connections.

It was a welcome return to some semblance of normalcy to make the trek back to Seven Springs last June, and Jay Blechman and his committee brought you top-notch programming,



Joe Froetschel
Bench-Bar Committee Chair

even when the new ownership of Seven Springs lost its reservation system, lost power to the elevators, lost its internet connection and even lost its chef! With those kinks out of the way, we could not be more excited to bring you the 59th Bench-Bar Conference – Back, and Better than Ever!

From June 15 to 17, this conference will be reminiscent of the past – with hospitality suites, breakfast with the judges and lawyers cutting a rug on the dance floor – but will have some exciting twists, including pickleball and bocce, a mimosa bar and every lawyer's favorite, trivia! Thanks to the efforts of Vice-Chair Holly Deihl, and the talented staff of the ACBA, there truly is something for everyone.

Thursday morning will kick off with the athletic events. The Highlands Golf Course promises that this year's

tournament will be outstanding, with skill prizes and awards for the top teams. Shooters in the sporting clay competition will also vie for fame (and prizes) and will be treated to food and drinks before and after the big event.

Starting Thursday afternoon, the days will be jam packed with great programs featuring the best of the committees, divisions and sections of the Bar, offering up to eight hours of CLE credit. Among these are the Judges Only CJE, Tips on Overcoming Self-Doubt from the YLD and a general counsel program featuring prominent local in-house lawyers. But most exciting is a plenary session for the record book. We will hear from former-ACBA Player/newly installed Madam Chief Justice Debra Todd, who will be joined by Justice Christine Donohue, Duquesne University President Ken Gormley and some of the most prolific advocates in the ACBA to discuss best practices and advocacy at the highest level.

And if athletic competitions, CLEs and socializing are not enough to convince you to attend, what about entertainment? We've got that. DJ Loyal and Team will be there with music, trivia, karaoke and photo booths both evenings. This year will see a return of hospitality suites and the Bench-Bar Committee will provide the best mocktails in its alcohol-free suite. Wrapping up on Saturday, brunch will feature more than just mimosas and Bloody Marys, as we look to end the Conference on a high-note...

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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



Frederick Goldsmith

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, 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 a 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

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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"
