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More Boardrooms Than Courtrooms Doesn't Mean Litigation Skills Aren't Important

Aspiring litigators should hone their written and oral communication skills and focus on diligent preparation and close attention to detail; these tools are invaluable whether a case concludes at trial or, more likely, in a conference room.

By Kathleen M. Kline and Gregory T. Sturges | July 29, 2020 | The Legal Intelligencer

In recent years, the use of alternative dispute resolution (ADR)—generally arbitration or mediation—has increased, as clients grasp for options that are quicker, less formal, and cheaper than fighting in court for years. Although many young lawyers yearn for their first trial, anticipating the thrill and challenge of standing before a judge and jury and presenting a well-practiced and compelling closing statement, in reality, exceedingly few disputes end by jury verdict. Far more common is resolution outside the courtroom, and thus modern litigation is composed mostly of things other than trial advocacy. Aspiring litigators should hone their written and oral communication skills and focus on diligent preparation and close attention to detail; these tools are invaluable whether a case concludes at trial or, more likely, in a conference room.

Arbitration allows parties to submit their dispute to a neutral decision-maker, much like in a trial, but generally involves a more streamlined exchange of discovery and presentation of evidence in an informal setting. Mediation, when successful, allows parties to avoid a trial altogether and negotiate a settlement with the assistance of a third party. ADR is often required by contract or by court rules, or is simply preferred by clients and lawyers as a means of avoiding the cost, delay, and publicity associated with litigating a matter

in a court of public record. Although ADR procedures are different from litigation and trial, ADR requires many of the same skills and capabilities as traditional litigation.

Write Well

Writing clearly and persuasively is an invaluable tool at every stage of the case, from pleadings through discovery to post-hearing briefing. Communicating effectively to clients, witnesses, opposing counsel, and the court is essential to putting forth your best case and serving your clients' interests. Written submissions set the tone for the proceedings and may also be dispositive of a case. Strong writing skills are important in ADR as well; arbitrators require briefing just as frequently as do courts, if not more often. Indeed, when an arbitrator is a fact finder, the parties' post-arbitration hearing briefs are the most important documents in the case, summing up the law and the facts the arbitrator needs to decide. Well-written, compelling briefs can tip the scales in your favor. Mediators, too, often expect written statements of each party's position and the strengths and weaknesses of their case. A well-written mediation statement can often sway a mediator to one side, and lead to a more successful settlement. Strong written submissions can set the stage for successful resolution, in litigation, arbitration, or mediation.

Know Your Case

Regardless of the forum, it is always crucial to have a firm command of the facts and legal issues in your case. While ADR seeks to streamline the litigation process, thorough preparation remains a fundamental requirement. You should be prepared to answer unexpected, probing questions from the mediator or arbitrator about your claims or defenses, just as you would be if you were before a judge or jury. Like a judge, a mediator or arbitrator may take interest in any aspect of your case, including those you may have considered trivial before the decision maker set you straight. It is important to seek input from trusted colleagues, who can review your case with fresh eyes and help you spot issues you may have overlooked. They may share recent developments in the law that have not yet hit your radar or have valuable insights into an arbitrator's decisional history or mindset. Because mediations are confidential, the mediator may ask candid questions and expect candid responses, especially if the answers might reveal weaknesses in your case. Understanding the strengths and weaknesses of your position can help facilitate settlement. Likewise, a strong grasp on the relative merits of the parties' positions may help you determine whether your case is likely to settle, or if client resources would be better spent preparing for trial. The same tough negotiating skills you hone during clashes with opposing counsel are paramount in mediation.

Play by the Rules

Regardless of forum, knowledge of the applicable rules, requirements, and deadlines is important. Jurisdictions with mandatory ADR requirements generally have their own set of procedural rules, as do commercial arbitration providers. Evidentiary rules also may differ, depending on your forum or arbitration provider. When arbitration takes place pursuant to a contractual agreement, a clear understanding of the contract's terms is also important—many contracts contain choice of law provisions, which may conflict with the rules of a forum or arbitration provider. Determine early in the proceeding which set, or sets, of rules govern, and familiarize yourself with them. Applying the wrong state's law or evidentiary standards may cause you to overlook a winning defense, or waste time and resources crafting an irrelevant argument. Because a goal of arbitration is to shorten the dispute-resolution process, deadlines may be more condensed than those imposed by state or federal courts. Be aware of the timeline for a proceeding, particularly when client input is required—communicating about tight deadlines as early as possible can forestall unnecessary stress for both you and your clients. In mediation, the rules are even more informal. For example, getting to know your mediator one-on-one and having candid conversations with them that you could not with a

judge or arbitrator may be a good idea. These discussions can be crucial in setting expectations and winning the mediator to your side.

Expect the Unexpected

Even with meticulous preparation, planning, and research, litigation is uncertain; the same is true of the ADR process. Being flexible and prepared for change remain keys to success. During discovery, you will uncover facts that make your client's position weaker or stronger than you initially anticipated. These facts may change your strategy—holes might develop in an initially strong argument, making settlement a more favorable option than litigation. In these cases, your plans may change: instead of preparing for dispositive motions and trial, you may want to discuss the benefits of mediation with your client. Conversely, settlement negotiations that had been progressing amicably may break down, forcing you to shift gears and resume the traditional course of litigation. The ability to react quickly to new information and changing circumstances will allow you to serve your client's needs regardless of the procedural posture of the dispute.

With substantial overlap of skills required to successfully try a case and resolve a dispute through arbitration or mediation, strengthening them will well serve any aspiring litigator. Attention to detail, nimbleness, and communication skills are essential items in a litigator's toolkit—both in traditional litigation and in ADR. Refining these skills can help lawyers to navigate the various paths litigation can take, both in and out of the courtroom. This preparation and flexibility will maximize the value young lawyers can provide to clients and allow them to adapt to future changing trends in dispute resolution.

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