

May 2017

## Protect Your Deal By Protecting Your Client from Minutiae

One of the toughest parts of mediation comes at the end of the day, when the parties and counsel have agreed on the terms “in principal” and the task of drafting the agreement begins. This is not a huge challenge when mediating a simple personal injury case with one payor, but when mediating business, real estate, contract, intellectual property, and other disputes with “going forward” issues beyond a release, there are a couple of useful strategies to keep in mind.

It is the end of what has been a tough day. Everyone needs to get a glass of water, take a breath, and review their notes. Now is when it’s important for the mediator and the parties to make sure the deal is complete. Was there some term or condition discussed along the way that the parties might have overlooked? For example, perhaps confidentiality was raised midway through the process, but it has not been reiterated for several hours. The mediator can be expected to keep the deal points front and center, but sometimes, for strategic reasons, certain deal points get put aside by one party or the mediator *on purpose*, so that the process does not get bogged down on terms that do not go to the heart of the dispute. Terms like confidentiality, attorney’s fees, and venue for breach of the agreement are often left to the end.

As the mediator, the parties expect me to be the “historian” of the deal. But at the same time, I am loathe to bring up a deal point that one side or another may have voiced early in the process but which has not been reiterated by them.

Brought to you by  
**David W. Henry, Esq.**



Should you have additional inquiries, please contact:

**David W. Henry, Esq.**  
Shareholder  
Professional Liability Department

Florida Supreme Court Certified  
Civil & Appellate Mediator

Member, National Association  
of Distinguished Neutrals

Landmark Center One  
315 E. Robinson Street, Suite 550  
Orlando, FL 32801  
407.420.4418  
[dwhenry@mdwcg.com](mailto:dwhenry@mdwcg.com)

Maybe they decided it was not important. Truth be told, the mediator has to tread a careful line between being an accurate historian of the deal points and injecting new or stale points into a deal that could work as is.

To solve this problem, I always articulate the deal's points as they stand in my mind and in my notes, and then I ask the attorneys and clients, "Is there anything else you need as part of this deal?" This is my way of protecting them from the problem of "forgotten" points, and it forces them to think about what matters. The onus is ultimately on the attorney—not the mediator—to ensure the deal has the essential terms the client needs.

Another important strategy I employ during the deal drafting stage is to bring the attorneys together to discuss the written terms outside the earshot of clients. I have learned that the deal can unravel if the attorneys are bickering over secondary terms in front of their clients late in the day. Sometimes humorous exchanges between lawyers do not sit well with the clients who have made a hard bargain. Likewise, lawyers haggling over deal terms is like making sausage and is best left unseen by the customer. If there are changes or new matters beyond that previously agreed "in principle" that require client consent, a short walk back to the private caucus will work. But I make sure to insulate clients from most of the discussion and deal-drafting process. The client needs to make an informed decision, but he or she does not need to see the lawyers' interactions with one another and the mediator during the drafting process. Protect the deal by protecting your client from the minutiae of the drafting process that occurs at the end of the day.

Visit our Firm's Website

<http://www.marshalldennehey.com>

**MARSHALL DENNEHEY  
WARNER COLEMAN & GOGGIN**

ATTORNEYS-AT-LAW

PA NJ DE OH FL NY

The material in this law alert has been prepared for our readers by Marshall Dennehey Warner Coleman & Goggin. It is solely intended to provide information on recent legal developments, and is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We welcome the opportunity to provide such legal assistance as you require on this and other subjects. To be removed from our list of subscribers who receive these complimentary Mediation Notes, please contact [dwhenry@mdwcg.com](mailto:dwhenry@mdwcg.com). If however you continue to receive the alerts in error, please send a note to [dwhenry@mdwcg.com](mailto:dwhenry@mdwcg.com).

ATTORNEY ADVERTISING pursuant to New York RPC 7.1 © 2017 Marshall Dennehey Warner Coleman & Goggin. All Rights Reserved.