

INDIANAPOLIS BAR ASSOCIATION



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'Shut Up Already' and Four Other Top Tips for a Successful Family Law Mediation

By, Elisabeth Edwards and Holly Wanzer of Jocham Harden Dimick Jackson LLP

Have you gone a little light on mediation preparation lately? It's time to jump start your mediation mojo with some tips about how to get in, get settled and get out of the way.

Know your own case. This is sure to elicit a giant "No Kidding", but it is amazing how many attorneys waltz into mediation with only a vague idea of the case. Mediators love, love, love the attorneys who take mediation as seriously as trial. They know every issue and their client's position on each. They can articulate best and worst case scenarios, so they see the "middle ground" where settlement will likely occur. They know what their client's hot-button issues are

so they are not wasting time arguing over Aunt Mary's World's Fair spoon collection when their client just wants the blender. Be as ready to present the marital estate and child support calculations in mediation as you would be in court. (P.S. The prepared have fewer ten-hour marathons and more "it's only 4:00 p.m. and we're done..." days).

Prepare your mediator with the right information. The mediator has the pleasure of facing that sticky, icky issue in your case that is preventing it from settling. In order to settle, you are going to have to talk about it and all its ugliness. You do your client a giant favor by 'fessing



Edwards



Wanzer

up before mediation. Is it infidelity, gambling debts, passive-aggressive, narcissistic, overly emotional parties? Spill it. Please. (Even if the problem is your client). Hours of mediation can be saved if you craft a useful Confidential

Mediation Statement instead of a 20-page dissertation of the relevant case law. The mediator does not need to read a treatise, but would appreciate the information which impacts how he will present information in each room. What is more beneficial is a list of the pending issues, including your client's starting place and bottom line, and an explanation of the dynamics of the case. If you know that

your client needs some "tough love" as to what is reasonable, or that one party will be extremely emotional, tell the mediator. Finally, is there a pending offer? Articulate it in your statement. You've just jump-started the mediation.

Prepare your client. Talk with your client prior to mediation to let her know the best and worst case scenarios if she goes to court. Explain that at mediation *she will get neither*. Mediation is compromise, and the client will need to do some horse-trading to end up with an agreement. Your client also needs to understand while it's possible she will go to court and get her "best day", there is tremendous value to ending the risk that she will get her "worst day". Not to mention that a big win in court can result in a Notice more **MEDIATION** inside ➔

IndyBar Member Wins Election to Challenge Mayor in November

Melina Kennedy won the Democratic primary race for Indianapolis Mayor last week. A partner at Baker & Daniels and a past chair of the IndyBar's Women and Law Division; Kennedy was involved in the only contested election in Marion County involving an Indianapolis Bar Association member. She will face incumbent Mayor Greg Ballard in the November general election.

IndyBar members Aaron Freeman and Robert Lutz were unopposed in their bids for re-election to the City-County Council.



Kennedy

The Basics of Education Law for Lawyers

By Catherine Michael, J.D., Chair of the Education Law Division of Hollingsworth & Zivitz, P.C.

In an increasingly complex world full of legal intricacies and overlapping requirements, the sphere of Education Law has become a jungle filled with a multitude of federal and state laws, regulations, case law decisions, and executive orders. It is a practice area that requires a thorough knowledge of the law for both those representing schools and parents.

Federal law plays a major role in education cases today. These laws include: No Child Left Behind (NCLB), the Individuals with Disabilities Act (IDEA), Section 504 of the Rehabilitation Act of 1973, FERPA, HIPAA, and the ADA. In addition to the requirements found in the federal system, Indiana must develop, maintain and operate its own school system. In Indiana,



Michael

our rules provide for school structure and guidance. An entire article of the Indiana Code, Article 7, is dedicated exclusively to laying the framework for Special Education in public schools.

For education attorneys in Indiana who represent parents, the practice frequently involves Article 7 Special Education Due Process Hearings, Section 504 Due Process Hearings, and school disciplinary issues. Both IDEA and Article 7 of the Indiana Code require all public and charter schools in the State to develop an Individualized Education Plan (IEP) for each student with a disability who is qualified for special education. This IEP must be specific to the child and provide specially designed instruction. This "Specially designed instruction" must address the content, methodology or delivery of instruction, specific to the child's unique needs resulting from the disability, while ensuring the child's access to the general curriculum so that he or she can meet the educational standards that apply to all children. 34 CFR 300.39 (b)(3).

Unlike No Child Left Behind, there are no reporting requirements or state review as to a school's compliance with the special education laws specific to individual children and their programs. Article 7 and IDEA require the parents to enforce the law if violations occur. This is done by instituting an "Education Due Process Hearing" thru the Indiana Department of Education. For example, if a school has not provided programming, or has failed to address an area of need for the child, the burden is on the parents to seek review.

For students with disabilities like autism or an anxiety disorder, the needs are not merely academic. The specialized and unique needs of a student with a disability encompass more than a mastery of academic subjects such as reading and math. These extend to include emotional and psychological needs, life skills, and social training. See *County of San Diego v. California Special Educ. Hearing Office*, 24 IDELR 756 (9th Cir. 1996).

What can often lead to litigation is that the law does not spell out to a clear and definitive degree what is "appropriate," since it is meant to be specific to each individual child. "The contours of an appropriate education must be decided on a case-by-case basis, in light of an individualized consideration of the unique needs of each eligible student." *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982). This leaves practitioners relying extensively on federal case law for similar cases and expert testimony regarding the specific needs of that individual child.

Article 7 Special Education Due process hearings are hearings structured very similar to that of a trial. They can last three more **EDUCATION** inside ➔



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For more information, contact Megan Keever at mkeever@indybar.org

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PRESIDENT'S COLUMN

How Could You Not be Humbled

I don't know about you, but when I was in law school, I read the appellate cases and was impressed with, and in awe of, the entire legal system. It was a system whose foundation rested soundly on the Constitution, but had immense flexibility in its application. That was left to the advocates and ultimately to the juries and the Courts. I was proud, and humbled, to be learning how to be a part of that great system.



Michael J. Hebenstreit
Whitham Hebenstreit & Zubek LLP
IBA President

We were taught the importance of the rule of law. We were also taught about the Constitution, the separation of powers, and the balancing of Federal versus State interests. These are concepts that are sometimes forgotten in the day to day aspects of a busy law practice. When you were in law school did you foresee yourself handling a First Amendment case, arguing a search and seizure issue or a voting rights case? Many lawyers have never tried a jury trial and even fewer have handled an appeal. As time passes we begin to pay attention to the immediate issues facing us and the demands of our clients and families, not to mention the economics of earning a living. We slowly lose sight of the idealism and lofty concepts we thought about in law school. Sure, we still read cases, stay up on the new changes, and stay sharp in our respective areas, but do we ever stop to remember why we became a lawyer or what it means to be a lawyer?

Since May 1st was Law Day, it is probably an appropriate time to stop and think about our legal system and what it means to be a lawyer. Luckily, I was able to experience that first hand. I was fortunate enough to have been invited to travel to Chicago to observe the Seventh Circuit Court of Appeals. Circuit Judge John Daniel Tinder invited a small group of friends with rather diverse backgrounds to observe "his world" in the Federal appellate system. It was absolutely fascinating. One member of our party (a non lawyer) commented that we were all on an adult civics class field trip—a very apt observation.

Our visit started on a Sunday with a behind the scenes look at the Dirksen Federal Building including the chambers, the Seventh Circuit Courtroom, the conference room where the Judges confer after arguments, and the Judges' locker room. We then went to the District Courtroom where, on the following day, the second corruption trial of former Governor Blagojevich was to begin.

On Monday morning the streets outside the Federal Building were jammed with mobile television trucks, and the lobby was crowded with

network television camera crews. We did get a glimpse of the defendant on his way to Court. In the long corridor on the 25th floor there was a sign identifying the area as the location of the trial of the *United States of America v Blagojevich*. I can't imagine how one feels walking down that corridor on the way to opening statements in a proceeding that could cost you your freedom. But it was also comforting to know that he, unlike alleged corrupt officials in other countries, has the benefit of a sound legal system, a jury, and the right of appeal to insure that the system works and that he receives the fairest result possible. All those ideals that they taught us in law school were present.

I have not been privileged enough to actually argue before the Seventh Circuit, and it was truly awe inspiring to be seated in that impressive Courtroom. Silently waiting for the session to begin, I could only imagine the level of angst, nerves, and adrenaline those appellate counsel must have been experiencing. Then the panel entered the Courtroom. It felt important because it is.

There were six cases to be argued that morning. One dealt with systemic organizational changes the Girl Scouts of America wanted to implement and the injunctive challenge of one of their Wisconsin councils. Another case dealt with the propriety of confiscating passports of citizens stemming from a collections case. Another was an immigration matter. One case involved the refusal of Great Britain to extradite a Nigerian to the US to stand trial for crimes against Americans in our Circuit. It dawned on me that these were not the typical cases heard in the courtrooms of the City County Building. These cases involved deep legal issues with impact beyond that of the individual parties to the litigation. It was fascinating and thought provoking, not just to the lawyers in the crowd but to the non lawyers as well.

Our group caucused after the arguments. We critiqued the attorneys and made our prognostications about the outcome of each case. All of us were impressed at the depth of knowledge the panel exhibited about the cases—the facts, the record and the legal precedent. Once the opinions are issued, we will know if we saw the cases in the same way the panel did, but it was a most impressive experience.

Although we occasionally get distracted by the nuts and bolts of actually practicing law, it is clear that the system we learned about in law school is working very well. It made me proud to be a lawyer and to be a small part of that system. •

IBA FRONTLINES

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Bingham McHale Honored with Community Involvement Award

Bingham McHale LLP was recently honored with the WFYI Community Involvement Award, which was presented to the firm at a recent volunteer appreciation luncheon hosted by WFYI.

"Bingham McHale LLP recognizes the importance of investing in our community, not just financially, but also with our time and talent," said W. Tobin McClamroch, Managing Partner of the firm. "I want to thank WFYI for allowing us to be a part of its important mission to engage people in the Central

Indiana community. We are pleased to be recognized for our commitment to our community."

The WFYI Community Involvement Award is given to external groups who have shown outstanding volunteer support and commitment to WFYI through fundraising and outreach activities. This year, Bingham McHale LLP supported WFYI with a corporate financial challenge match during the Spring Membership Campaign. Several members of the firm also volunteered to help during the campaign, including partners Jim Reed and Brian Welch, who co-hosted a portion of the semi-annual pledge drive together. •

Pro Bono Committee Seeks New Members

Andrew Campbell, Chair of IndyBar's Pro Bono Standing Committee and an associate at Baker & Daniels, has announced that vacancies currently exist on the committee. Due to job transfers outside the city three vacancies have recently been created.

The Pro Bono Committee monitors, operates and evaluates the IndyBar's pro bono initiative and identifies future opportunities for pro bono service and involvement. Some activities organized by the committee include the monthly Legal Line telephone based legal advice

program, the publishing of *The Commonly Asked Questions About Indiana Law* guidebook, the Marion Superior Court Pro Bono Project, the Low Asset Wills program, Hospice Program and more.

Any IndyBar wishing to be considered for one of the committee vacancies should contact IndyBar Pro Bono Coordinator Caren Chopp at cchopp@indybar.org. Standing Committee appointments, which will be made by June 15, will be recommended by the chair and must be approved by the IndyBar President. •

➤ MEDIATION from front

of Appeal and the start of an expensive Round 2 in the appellate court.

Don't draw a giant, grandstanding line in the sand. Nothing is more frustrating than the attorney who refuses to make counteroffers ("we stand on our last offer even though we've only been here two hours"). Mediation is not Theatre of the Law for your client's entertainment. It is a serious attempt to find a solution. Saying no without suggesting another option or storming out prematurely in protest is a waste of your client's time and money. If you don't even give it a go, you may never know that the other side was just posturing and was prepared to meet your terms. There is a time to inform the mediator that your client is making a "final offer", but

that time is rarely 10:30 a.m.

Shut up already! Your job is more advisor than mouthpiece. Kindly shut up and let the client talk. Chip in your advice when needed, but don't take over. The mediator will need your help with reality testing. While your mediator cannot opine as to what Judge So-and-So would do, the mediator can ask YOU to opine. Also, please remember who the boss is (and it ain't you). There are a million reasons that have nothing to do with legal precedent that might make your client inclined to settle a case about *his* kids and *his* stuff. Even if you think a better outcome is possible at trial, the decision is your client's. Advise the client if you don't recommend the deal; then get out of the way and draft a CYA letter when you return to the office. •

➤ EDUCATION from front

days or three weeks, depending on the number of witnesses and issues. Appeals of the hearing officer's decision proceed directly into federal court.

Another focus of education attorneys representing parents is that of injury in school. Due to tort reform rules and the fact that a school is considered a public entity, the damages in school cases are capped and often there are many federal issues. There is also the need to exhaust administrative remedies in actions where one or more of the remedies may be a different education placement or need, such as a residential facility or private placement.

While this is a complex field, it is a very fulfilling one for many education focused attorneys. Practitioners for both schools and parents have the rewarding job of working to ensure that children are being educated appropriately and their needs are being met. •

Association Note: In the fall 2011, the IndyBar Pro Bono Standing Committee will be restoring its School Education Advocacy program. IndyBar teaming up with the Foster Youth Education Initiative to provide volunteer assistance to youth in need of a variety of educational services. IndyBar members interested in advocating for children with special needs, please watch Indiana Lawyer, IndyBar.org, and weekly e-bulletins for more information about early fall training sessions.