

**From Haig's Business and Commercial Litigation 4<sup>th</sup> Edition**

**REFLECTIONS OF A LEADING NEUTRAL ON MEDIATION ADVOCACY**

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## **Introduction to Mediation Advocacy**

Texts on trial advocacy and litigation strategy are bountiful. The same is true for materials about ADR and recipes for becoming an effective mediator.<sup>1</sup>

Lamentably, there is very little material available on how to become an effective Mediation Advocate. A Mediation Advocate is a lawyer skilled at representing his/her client's interests during a mediation (as opposed to a courtroom litigation).

Old-school gladiator lawyers who want only to try cases and never to settle them face the same reality as did the dinosaurs. Their time is past, and they are no longer capable of functioning effectively in today's environment. They cannot serve their clients competently unless they complement their well-honed trial skills with a modern, better-adapted set of settlement skills. Specifically, in today's civil litigation environment in which more than 80% of all actions are mediated at some point, litigators need mediation advocacy skills.

My simple proposition is that becoming a first-rate Mediation Advocate is not only intellectually and psychologically challenging, but also, a necessary part of a litigator's repertoire. Unfortunately, most of my fellow mediators agree that the number of skilled practitioners of Mediation Advocacy is pitifully small. Those who master the art form have a clear advantage over their adversaries and are much more likely to "bring home the bacon" to their clients than those who are trapped in the orthodoxy of traditional negotiations and courtroom type advocacy.

## **Skills of the Mediation Advocate**

The purpose of this section is to heighten the litigator's awareness of some of the panoply of skills which make a successful Mediation Advocate and to suggest some ways to acquire them. Although some lawyers seem genetically programmed to be Mediation Advocates, namely, those born in Brooklyn, Mediation Advocacy does not come naturally or easily to many lawyers, especially litigators who need it most. Top-notch Mediation Advocacy requires different skill sets, disciplines and self-awareness than traditional courtroom advocacy.

What makes a Mediation Advocate outstanding? I will first list some of the qualities that I consider the most important, and then I will give some examples to demonstrate how a litigator can apply these skills in a typical mediation practice.

An outstanding Mediation Advocate is:

- Trustworthy
- A Good Listener
- Prepared
- Empathic
- Creative
- Self-Aware
- Flexible in Negotiations
- Confident –not cocky
- Patient with stamina

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<sup>1</sup> H. Jay Folberg, Esq., *Mediation*, is one of the best.

While this list is not exhaustive, the skilled Mediation Advocates I have encountered over 30 years and thousands of mediations embody most or all of these traits.

In the following sections, I offer examples of each trait in practice.

### **Skills of the Mediation Advocate—Trustworthy**

I spent four solid days working on a class action between a band of the most cynical, hard-bitten plaintiffs' class action lawyers in the world and a major corporation. In the middle of this marathon, lead counsel for the corporation walked into the plaintiffs' room and told assembled class counsel that if they would give him a *true reasonable final number* he would personally take it to the Board of Directors and lobby hard for its acceptance.

Generally, a request from one party to the other to "get real" is ignored. But here, the company's lawyer had such credibility and trustworthiness that the plaintiffs cut their demand by 40%. The case settled one week later after a full Board presentation. Plaintiffs' lead counsel confided to me later that this only happened because the plaintiffs felt that the company lawyer's word was solid. They trusted him.

Your reputation for trustworthiness- that your handshake is as good as a written contract- follows you everywhere you travel along the litigation highway. That reputation is built early and has great value with opposing counsel and the mediator.

### **Skills of the Mediation Advocate—A good listener**

Even those of us who have a few gray hairs (or no hair at all) are addicted to our phones and tablets. We tune out quickly and frequently. While this is fine while commuting on the train or waiting in the doctor's office, sitting in a mediation and working on an iPad while opposing counsel is speaking is not recommended.

Quite the contrary, a great listener captures everything being said and then mirrors it back in language that removes invective, demonization, or victimization from the communication. Earnest listening with carefully crafted mirroring is a real art form practiced by only the very best. Mirroring is very different from parroting or mimicking.

Echoing Ernest Hemingway's assertion that "most people never listen," Alain de Botton adds:

"Good listeners are no less rare or important than good communicators. Here, too, an unusual degree of confidence is this key—a capacity not to be thrown off course by, or buckle under the weight of, information that may deeply challenge certain settled assumptions. Good listeners are unfussy about the chaos which other may for a time create in their minds; they've been there before and know that everything can eventually be set back in its place."

In a recent case involving serious brain damage to a young student caused by a malfunction or defective gate at a parking facility, the father of the injured child vented for about 15 minutes about what this lapse of care by the parking facility had meant to his family. He not only told how this affected his family's daily life but accused the faceless parking facility of recklessness, callous indifference, and cruelty to his son which could have been easily prevented.

The lawyer of the owner of the parking facility listened attentively without interruption. He then validated the seriousness of the injury, and said that as a father, he understood that the loss of even 1%

of brain activity of his children would be a grievous wrong. He then read a statement from the owner to the father asking for forgiveness and pledging to do everything to settle the case in a thoughtful, fair and generous manner. He wanted the absolute best care for the victim. He always made safety checks of his facilities, but this incident had caused a companywide retraining and safety investigation so that it would never, ever occur again.

The alleged “indifference” of the defendant was melted away; the concern for the child was manifest. The air in the room charged. The case settled shortly thereafter.

I recently heard a plaintiff’s counsel, after a particular hard-nosed and defensive statement by a company executive which vilified the plaintiff class’s motives and integrity, respond to the hushed audience with this statement.

“Respectfully, Sir, would X (the famous founder of the Fortune 500 Company) be proud of you today if he was here to listen to your position? Is this the company culture this great company wants to foster?”

Listening helps the Mediation Advocate learn about the parties’ true interest. Scientists say that up to 90% of communication is non-verbal. A great Mediation Advocate picks up on the body language, the tone, the choice of words, the facial expressions, and even the silence from the opposing lawyers. This active listening is the guide for when, how, and to whom to press for concessions.

Active listening—the mirroring part—creates trust, establishes credibility, and shows respect. People like to be heard, and when I have watched a defendant describe precisely and articulately the core of what the plaintiff said about the case, the tone of the room changes and the atmosphere shifts slightly from antagonistic to collaborative (or at least, less antagonistic).

### **Skills of the Mediation Advocate—Be Prepared**

Lawyers are trained to ask for specific relief. That is great in trial. But in negotiation, it helps to “go with the flow” and be ready for a lot of “if-then” and “what-if” situations. A mediocre advocate will be emotionally and intellectually tied to one path and one outcome. A great Mediation Advocate will have thought through many permutations and can negotiate effectively in any of those modalities.

Most of the time spent in caucus? “No problem, I’m ready.” Client needs to talk? “No problem, I’m prepared.” The mediator wants to work in a decision tree? “Great, I have one right here.”

My observation is that the best Mediation Advocates are the ones that have adapted to a setting so seamlessly that it did not look like they were adapting at all. And not-so-good ones refuse to stray from the script they wrote before the mediation started, which often becomes the number one impediment on the path to settlement.

In a recent security case, the lawyers prepared detailed PowerPoint presentations for the common session before an audience of almost 70 people including insurance representatives, company personnel, directors, officers and class representatives. By agreement, defense counsel went first and gave a thorough and detailed outline of all the defenses of loss causation, lack of scienter, class certification, etc. It lasted almost 2 ½ hours, and when he concluded, we took a short lunch break and prepared ourselves for the plaintiff’s response.

When we returned, plaintiff’s counsel walked over to the wall socket and disconnected the dreaded PowerPoint machine. He then dramatically tore up his notes. He said he had responses to all of the defense positions, but while he had folks’ attention he would like a half hour to tell his story. He put

on his class representative, who told how she had put part of her precious retirement nest egg into the defendant's fund. Plaintiff's counsel then put himself in the witness chair and played the roles of the defendant's fund manager, accountant, and CFO, giving their stories in somewhat neutral but damning way.

It was brilliant; it got everyone's attention and convinced the carriers and the company representatives of their serious vulnerability should plaintiff successfully avoid all the technical pitfalls of her case.

Be prepared by bringing a term sheet with proper language for the releases; be prepared by spending time with your client before the mediation; be prepared with multiple options, and be sure to take into account today's social media and technology.

### **Skills of the Mediation Advocate—Empathic**

The famous Thomas-Kilmann test measures where a person falls on a scale of empathy and assertiveness—that is, how well a person takes in the needs of others and how skilled he is at making sure others understand his needs.

In law, we are trained to put our arguments out there and to shoot down the arguments of the other side. That is not useful in mediation (or negotiation), where the goal is to reach agreement with the opponent.

A defense lawyer in a catastrophic personal injury case I mediated made an opening that began, "I know that if we were in court, your lawyer would make outstanding arguments on your behalf. And I'd do my best to make arguments in opposition. It would be a colossal fight. But today's not the day. Today is the day we express how sorry we are that this injury occurred and the day we search as partners for a solution that leaves us both better off than we would be if we went to court." When I heard that, I knew the case would settle. And it did.

Empathy- putting yourself in the other person's shoes does not extend to your making the mistake of saying you understand how the other side lives or you feel their pain- that sounds phony and often backfires.

### **Skills of the Mediation Advocate—Creative**

Many advocates turn every aspect of a dispute into a number, ignoring other factors that may be relevant to the parties or important to resolution. But a client fired from her job who believes she was a victim of unlawful discrimination cares about many things aside from money—revenge, protection of others, future employment, self-worth, and more. And in court, each of these is assigned a number. The discussion is all about tug-of-war.

On the other hand, when differing and complementary interests can be added to the mix, creative solutions can emerge. In a name-infringing dispute I mediated between a record company and a charitable organization, the record company's lawyer made a string of unique and interesting suggestions that would meet all sides' interests far better than the mere payment of dollars. The artists at the core of the dispute agreed to provide services and help with fundraising and brand awareness for the charity, and a deal that could never have been resolved with a single number was resolved because the Mediation Advocates were creative thinkers.

Offering a sincere apology, a return of a job title or personal property, a favorable press story, or cessation of a practice will galvanize a resolution. In the past decade I have witnessed increasingly creative solutions to disputes- many of them were the product of solid preparation and imaginative thinking by creative Mediation Advocates.

### **Skills of the Mediation Advocates—Self-awareness**

Once, in a dispute involving a major environmental case at a nuclear power plant, I heard a well-timed apology – not for the problem underlying the dispute, but instead for a prior overzealous deposition. The Mediation Advocate who took the opportunity to make amends for his litigation behavior was able to deftly switch gears once he realized how he had come across.

He had to craft a new persona: a Mediation Advocate persona. Once he did, the case settled soon afterwards.

A good Mediation Advocate can self-reflect and ask himself, “Am I being overly aggressive?, knee jerk reactive?, overly passive? Am I more empathic or assertive?”

While not every lawyer is capable of or needs to reach a Zen-like state or self-awareness, knowledge about how he comes across and the ability to vary his approach depending on how he is being received will help any Mediation Advocate improve their results.

It takes some humility and curiosity for Mediation Advocates to seek feedback, find out how they come off generally, how they relate to the other gender, and how they relate to other cultures and races. Federal judges are notoriously deficient in seeking this kind of feedback. Mediation Advocates do not have the luxury of a lifetime appointment to avoid this exercise, so they should always seek post-mediation feedback from the mediator.

### **Skills of the Mediation Advocate—Flexible in negotiations**

Flexibility is key to settlement negotiations. A good Mediation Advocate changes his approach depending on the situation. Sometime it is being patient in the traditional negotiation dance, and sometime it is an exquisitely executed take-it-or-leave-it demand.

It reminds me of the saying: “When the only tool you have is a hammer, every problem looks like a nail.” Effective Mediation Advocates have more tools. They have learned when to use “brackets” or conditional offers and when to seek refuge in a mediator’s proposal.

Often a negotiating impasse can be averted by using conditional offers or “brackets.” In other words, the parties define a territory of good faith negotiations, such as: “We will go to \$1 million but only if you will move to \$3 million. Then we will negotiate in good faith where the case can settle within those ranges.”

Flexibility is particularly indispensable in mediation with a cross-cultural component. I have witnessed a brutally aggressive American lawyer with a practice of promulgating inflated initial demands cut every bit of fat off the first demand when facing a Japanese national who would likely have taken a serious offense to a “padded” demand.

### **Confident- not cocky**

Mediation Advocates should be confident about their case and their client's goals without the strut of absolutism often part of courtroom science. The Mediation Advocate has to be able to talk frankly about the weakness in his client's case. Often an outstanding Mediation Advocate can respond to the admitted weaknesses in a way that strengthens his client's ultimate position. I have seen great Mediation Advocates knock down their "weaknesses" like bowling pins with an Akido-like deftness that turned the weakness into strengths and turned the settlement tide in their favor. And never underestimate the power of optimism. Problems and obstacles, as the Chinese tell us, are just opportunities.

### **Patience with stamina**

Good Mediators repeatedly remind the parties and counsel that patience is the key, the mantra we live by. The process usually takes more time and involves more components (issues, questions, side steps, follow ups) than they likely anticipated. Frustrations and inevitable dark moments regularly occur and must be overcome. Also, many mediations are physically taxing; it's easy to get cranky, irritable, and even sarcastic (like the mediator), especially when the festivities drag on into the evening. A good Mediation Advocate is both patient and resilient. That being said, the good Mediation Advocate knows when to urge the mediator to put the hammer down when everyone has had their "day in court", when the process is dragging and going nowhere. That is when it is time for bold moves and forceful action.

### **Services performed by the Mediation Advocate**

Now that we have seen what a Mediation Advocate is, let us turn to what a good Mediation Advocate does. I would like to offer a menu of services a Mediation Advocate can and should provide to get the best result for his client.

### **Services performed by the Mediation Advocate— Designing the process**

In many disciplines including architecture, engineering, sales, and psychiatry, designing the process to fit the particular subject matter is as important as the substance or final product. In mediation, good process design is critical for success.

A Mediation Advocate needs to be familiar with the whole arsenal of various ADR processes and should not cede the design entirely to the mediator. While there are still the traditional mediations and arbitrations, the landscape of ADR has expanded and broadened. There are many hybrids and innovations that might be perfect for a Mediation Advocate's case. For example, there are mediations that happen prior to the filing of a complaint. There are neutral evaluations, mediations that blossom into arbitrations ("med-arb"), arbitrations that are mediated after the award is written but not announced ("arb-med"), so-called "baseball" arbitration, night baseball arbitration, and others. The process of resolving a claim effectively involves picking and choosing from among the array of modern tools and using them to design a process that fits the dispute. Truly talented Mediation Advocates play a huge role in navigating the process design phase of mediation, and they do not passively allow these questions to be decided for them by a mediator or by their opponent.

A talented Mediation Advocate will often "suggest" a process to the other side or the mediator, and that suggestion is frequently adopted by everyone. Top-of-the-heap Advocates make everyone feel that the suggestion was their idea, because in mediation—unlike in the music industry—authorship is never important; it is the process that matters. Tailor the suggested process to the strengths and

weaknesses of the case. A good Mediation Advocate should rely heavily on his and the case's strengths (whatever they may be), whether it be featuring a charismatic and attractive client, employing a brilliant Board, exchanging strong data early, conducting sessions at the site of the accident or claim, or even falling back on rock-paper-scissors-style diplomacy if all else fails.

In a case involving three "masters of the universe" in a particular industry, the lawyers (all outstanding Mediation Advocates) realized that a traditional mediation process would not work. So one of the lawyers came up with the following innovative process that all counsel and even the three masters of the universe accepted:

1. The lawyers filed confidential 15-page letter briefs setting forth their respective positions.
2. I was assigned a mutually respected accountant to assist me.
3. I then met with all three CFOs together for a day with my accountant where we were free under the mediation privilege to ask questions.
4. I was then dispensed to meet separately with each of the three principals to hear their positions unfiltered and first-hand.
5. I was then authorized after a final one-hour ex parte session with each lawyer (in which I received their recommendations) to put out a mediator's proposal.

The mediator's proposal was accepted, and a three-month multi-billion-dollar trial was averted.

#### **Services performed by the Mediation Advocate—Timing the mediation**

Every case is different and there usually is no single, perfect, or obvious moment to initiate mediation. Sometimes the right time is pre-complaint. Mediating pre-complaint involves picking up the phone and calling the lawyer on the other side to suggest an early peek at the case for settlement purposes. The talented Mediation Advocate knows that pre-complaint or pre-discovery mediations are often much riskier than when there is more information. That said, business people often have to make decisions based on less than perfect information, and these business people will usually support their lawyers suggesting pre-complaint mediation in appropriate cases. Some of the best deals I have seen have been initiated by Mediation Advocates at an early stage when putting the tourniquet on costs and exposure has a very high value to their client. That early-stage flexibility in information gathering and negotiations is something the successful Mediation Advocate must possess.

Of course, the optimal time to initiate mediation can differ from case to case. Sometimes it is after the complaint has been answered. Other times it is just before the motion to dismiss is decided, or it could be when a critical deposition is about to be taken. While there is no perfect moment to start a process, when working with a good mediator—one who protects the parties at an early stage—even unsuccessful early mediations provide real benefits to both sides (I do not mean detested "free discovery") which set the stage for a later settlement. If nothing else, it provides the client with a valuable opportunity to see the case from both sides—something a good Mediation Advocate always tries to provide to his client.

Outstanding Mediation Advocates never give up and keep looking for the right opening to return to the table. I often receive calls from a Mediation Advocate indicating that if I were to suggest a return to the table, it might have some legs (because of a new claims adjuster, a rumor that plaintiff's business was in trouble, a looming motion, a recent decision from the Fifth Circuit, etc.).

#### **Services performed by the Mediation Advocate—Selecting a mediator**



Any good Mediation Advocate is familiar with a large stable of qualified mediators and arbitrators. Their contracts in his/her phone are one of their most important assets.

However, a good Mediation Advocate also knows that good Arbitrators do not always make good Mediators and vice versa. A good Mediation Advocate looks for a perfect mixture of subject matter knowledge and facilitative skills, with a heavy emphasis on the latter. Until the day comes when Yelp! Or some other internet review services publishes mediator services, a Mediation Advocate must develop their own resources for finding the right person—bearing in mind that the right mediator is one who will also be acceptable to the other side.

A top Mediation Advocate will have built credibility with a wide range of mediators through a continued demonstration of his/her trustworthiness. In fact, the best Mediation Advocates are comfortable with a wide range of capable mediators, so that they can choose the right mediator for the dispute and also that they can adapt to a new mediator, perhaps one chosen by the other side.

And on that note, great Mediation Advocates know that one of the mediator's most important jobs is to convey messages to the other side. Therefore, if the other side proposes a mediator with whom the other side is familiar, great Mediation Advocates are likely to accept the proposal because they know that a mediator who has a prior relationship with opposing counsel is likely to be an effective messenger.

### **Services performed by the Mediation Advocate—Preparing for the mediation**

My fellow mediators would all agree that the level of preparation and skill by Mediation Advocates at most mediations ranges from fair to poor. It continually astounds me how much time lawyers will put into preparing for a deposition or a discovery motion and how hastily they prepare for the mediation. In a world in which less than one percent of cases end in verdicts, it is surprising that the lawyers prepare elaborately for a trial that will never occur, yet feel that the only preparation they need for mediation is a good night's sleep.

In an effort to change that behavior, I put forward the following checklist of the key steps any great Mediation Advocate should take in preparing for mediation.

#### **Prep Item 1. Status call with the mediator.**

A mediator often will set up an initial status call with the participants. But if the mediator does not initiate a status call, a Mediation Advocate should demand one. At the telephone status call, agree on the briefing schedule, the nature and extent of presentations at the mediation, who will be attending from both sides, and the exchange of information prior to the mediation. A good Mediation Advocate does not assume that these things will happen in an orderly fashion. They ensure that they do. It is embarrassing to show up with a high-level client—say the CEO—when the other side brings a low-level employee.

#### **Prep Item 2. The mediation brief.**

It is so rare that I get an excellent mediation brief that, when I do, I send a handwritten note to the lawyer thanking him or her. Sadly, the mediation brief is most often a hastily thrown together compilation of previous motions or pre-existing documents. A brief like that does not give the mediator a real feel for the facts and the issues in the case in a balanced and informative fashion.

Keep in mind that this brief is generally the mediator's first introduction to the Mediation Advocate and their work. Of course, make all of the important advocacy points, but also focus on building confidence and trust with the mediator, because that will pay off big-time in the final negotiations.

Whether to exchange mediation briefs or not is a perennial debate, and one I want to end right here. After being a mediator for 30 years, I have seen very few cases where the right choice was not to share briefs. I strongly recommend that the Mediation Advocate agree to exchange his brief and then to send a separate confidential letter to the mediator. The letter will contain any information that might be strategically withheld, and a really good confidential letter might also contain constructive suggestions or tips on how the mediation might run more smoothly or how to break an impasse. Tips I receive from good Mediation Advocates are often critical to the settlement (and I love being able to take credit for these tips). What might such a tip be? Things like:

- Be sure to talk to my CFO before we begin the common session.
- My adjuster is the only woman in this dispute, and she is sensitive to gender bias, so please be sure she is given a fair chance to be heard.
- My decision maker has to be on a plane by 7 o'clock, so we need to "get real" before it gets dark.
- The settlement judge tried bullying my client, and it was a disaster.
- My client started to distrust my advice when I told him that we should explore the settlement of a case that he believes strongly in.

This kind of information is very helpful to the mediator and will build trust in the Mediation Advocate.

### **Prep item 3. Crafting intelligent and helpful opening offers and demands.**

A good Mediation Advocate has to be skilled in negotiations. This means the Mediation Advocate is not trapped in the orthodoxy of the "bazaar at Istanbul" school of negotiation. "Different strokes for different folks" should be the mantra of every good Mediation Advocate. The skills of negotiations could fill a book, so I will not dwell on them other than to remind readers that negotiation skills are not an inherited trait. An effective Mediation Advocate needs to study and learn their own best style and must have different modalities at their disposal. Once again, trustworthiness is a Mediation Advocate's biggest ally.

A Mediation Advocate representing the plaintiff should not just play it safe by proposing a huge number as an initial demand. While it is tempting to ask for the moon, it often sets the mediation back for hours. Sometimes the mediation never recovers from an outrageous first request. Instead, think about how the opening number will impact the other side and the message conveyed with it. The Mediation Advocate should not assume she fully understands how the other side will react. Having walked between rooms for three decades, I am still amazed by how wrong each side often is about what is happening in the room across the hall.

A Mediation Advocate representing the defense should remember that the defense is in control of the money and can set the playing field either through its responses or through the skillful use of brackets. The defense could respond to a high open demand of \$100 million with this type of bracketed response: "Your demand is absurd but we acknowledge that this is an eight figure case. We don't want to spend this precious day out in the bulrushes. We will go to \$10 million out of the box but only if you are at \$25 million or below." In other words, good Mediation Advocates are not trapped in orthodoxy of the mediation dance or the bazaar at Istanbul as the only responses. Do not react to a high demand with

a lowball offer. Let the facts and the case dictate the responses, not an emotional reaction to the plaintiff's demand.

Regardless of which side he/she represents, the Mediation Advocate should think creatively about non-monetary components right from the start.

Unprepared advocates who fail to think creatively and prepare reasonable opening offers and demands can significantly damage their clients' prospects in a mediation. A colleague told me about a case in which one of the lawyers said to him, "Judge, we've worked with you, we trust you, we've decided our bottom line is \$X Billion, and we'd like you to come up with a plan to help us achieve that." My colleague's reaction was this: "These requests are at odds with the spirit of fierce neutrality, and of course, I have no such plan." The case not only settles for a small fraction of the amount referred, but the party lost credibility when it soon abandoned its stated bottom line.

Both sides would be well-served to prepare clients to expect opening offers and demands that are far from the zone of possible agreements. This brings us to the next item on the checklist.

#### **Prep Item 4. Preparing the client.**

Please, please, please meet with the client and any insurance carriers before mediation. Prepare them for what is going to occur. Get them ready to speak to the room in such a way that sets the stage for productive negotiations. Often, but not always, when the principals can talk to each other, it opens the path to a successful settlement. A Mediation Advocate should let them know how he/she and the mediator have planned the mediations (see Prep Item 1). Clients do not like to be surprised any more than lawyers do. Good Mediation Advocates discuss the common session, caucuses, and other key aspects of the process with their clients.

#### **Prep Item 5. Getting ready for the common session**

About 80% of the time, lawyers tell me, "Judge, we don't need a common session. We know what they are going to say and they know what we're going to say. It's just going to tick off my client, and he is already irritated. Just put us in separate rooms and get them to be reasonable" (translated: "get them to agree with us").

There is no delicate way to put this: this approach is flat wrong. Wrong!- despite a new mediation fad where a breed of mediators have disposed of the common session.

The effective Mediation Advocate knows when it is appropriate to skip the common session: rarely. If nothing else, the common session offers a chance for the principals to meet and set a constructive atmosphere before the parties recede into their dens and start demonizing the other side and victimizing themselves. To dispose of the common session is analogous to eschewing foreplay as unnecessary and time consuming.

That does not mean that a Mediation Advocate should give a trial opening statement or whip out the dreaded PowerPoint presentation at the common session. Instead, think about what to say that explains the case in a fair but firm manner while inviting the other side into negotiations in a sensible arena. Use the common session and the opening to break tension, build bridges, and open pathways to resolution that may not be obvious to the other side. I have watched with admiration as good common session presentations "change the air" (as the Japanese say) of the mediation. The effective Mediation

Advocate learns how to speak respectfully to the other side and how to use humor, leverage, peace, creativity, and even – occasionally—apology to his client’s advantage right from the start.

Speaking of humor, let me relay a story told to me by a friend. After the trial judge issued an emphatic denial of defendant’s motion to dismiss, the plaintiff’s counsel, speaking in mediation to a vast sea of defendants and insurers, said, “I don’t have any graphics, laser pointers, or PowerPoint presentations. We’ve all seen the judge’s order. There is no longer a motion to dismiss exit ramp here, and there will be no summary judgment salvation. The case is going to trial before a jury. And do any of you here have any idea how f—king crazy 12 Jurors from San Francisco can be? That’s my opening, Judge.”

#### **Prep Item 6. Miscellaneous preparation checklist.**

Make sure that the confidentiality agreement covers the dispute at hand and is carefully explained by the mediator to all participants.

Prepare and bring to the sessions a term sheet with the appropriate release language so that, in the event of a 7 p.m. (or later) settlement, the necessary language is already prepared.

Consider using appropriate visual aids to make key points or highlight important facts. While PowerPoints are often a drag, other visual aids are welcomed and often very effective. For instance, in a case involving a maritime accident, a film about the history of marine industrial diving compared to ancient pearl diving was very effective. By dramatizing the risk that divers from ancient times to modern times have always endured, the film contextualized the case very effectively.

#### **Services performed by the Mediation Advocate—Bringing patience and creativity to the resolution process**

Unless a Mediation Advocate get the dream case, where settlement simply happens through a graceful dance of negotiations and resolves in a deal at 3 p.m., the parties inevitably will reach an impasse sometime during the day. Hopefully by the time of the impasse, the parties are closer together and can at least see the end, even if there are lots of obstacles in the way. However, because everyone has already compromised (with each side feeling as though it has given more than the other side) and all the low-hanging fruit has been picked, everyone is on edge, cranky, and ready to give up. Mediators often run sentry duty at the elevator at 3 p.m. asking participants to stay and not head for the nearest tavern.

This is where the Mediation Advocate’s creative skills most come in to play. Deals happen that seemed impossible only a few hours before. The Mediation Advocate’s task, along with the Mediator, is to keep people in the game until they can get in the place where options like Mediator Proposals and other creative means of bridging gaps can occur. The Mediation Advocate must have at their disposal a wide array of techniques to help bring this about. Where appropriate, suggest having the principals talk among themselves. Propose new brackets, or add a new component to sweeten the deal (like a new contract, a recommendation, or a helpful suggestion press release).

Don’t give up, and never, ever let the session break up without the parties, especially your client, recognizing the progress that has been made despite your disappointment in not reaching immediate closure. The successful Mediation Advocate does not let the client leave the mediation feeling like settlement is hopeless and negotiations are over. Parties often change positions the next day

or the next week after the mediation. Keep a process open. Consider mutual Board reports, a timetable to let things percolate, or a talk with spouses and family members. Always leave with some process in place for follow-up. While this is the mediator's job, when the mediator fails to do so, it is the Mediation Advocate who needs to suggest the process going forward. And always leave by saying goodbye and thank you to your opposing counsel. The Russians have an expression- don't pee in an old well, you may have to drink out of it someday.

### **Final thoughts**

To paraphrase Rumi, "Somewhere beyond right and wrong, there is a field. I will meet you there." A Mediation Advocate's job is to help guide participants into that field once the battle in the arena has run its course and the parties are stuck. Trust me: Good things happen in the field, and sometimes—not always—litigants' better selves appear.

These reflections are just a start. Mediation Advocacy is an art and a skill. I hope that I have provided readers with some useful insights and inspired them to learn more, to think harder about the topic, and to elevate Mediation Advocacy as a priority learning objective in their practice. Clients will thank them for it. And so will I.