ADVOCACY IN MEDIATION

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1. **Introduction**
   a. This presentation is not about transformative mediation, facilitative mediation, directive mediation, mediator certification, mediator ethics, the Samoan Circle, or any other current “hot” topics in mediation.
   
b. This talk is about one thing: advocacy in mediation. It is about how to get what you and your client want in mediation.
   
c. The aim is to offer practical tips for lawyers on advocacy in mediation.

2. **The Best Advocate**
      
      i. A recollection of an advocate who used a reasonable and unassuming tone to command a room of passionate parties.
   
b. *Advocacy by theater.*
      
      i. While passion may have a place in mediation, it must be kept within bounds.

3. **The First Thing to Realize Is That Mediation Is an Event**
   a. The mediation is not merely a stop on the road to trial, but an event to be taken seriously.

4. **The Second Point Is That Mediation Is a Flexible Process**
   a. You can combine ADR processes — for example, mediation and arbitration.
   
b. A common technique is to begin with a non-binding settlement process — like mediation — and, if that is unsuccessful, follow it with a binding, adjudicatory process like arbitration or private judging. See Mark Batson Baril & Donald Dickey, *MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?*, Association for Dispute Resolution of Northern California (June 16, 2014, 7:00 PM), http://adrnc.net/wp-content/uploads/2011/12/Resource-Page-MED-ARB-The-Best-of-Both-Worlds-or-Just-a-Limited-ADR-Option_0.pdf.
   
c. Another technique to avoid any potential problems with the mediator’s also acting as arbitrator is to appoint the arbitrator at the beginning of the mediation phase. This technique is known as “co-med-arb.”
5. **Select the Mediator and Mediation Style**

a. Your strongest ally in mediation advocacy -- if you can make him or her an ally -- is the mediator. *See* John W. Cooley, Mediation Advocacy 38 (Nat’l Inst. for Trial Advocacy, 1996).

b. Does the mediator have expertise in process, or in substance?

c. What are the mediator's references like?

d. Do you feel comfortable with the mediator?

e. What is the mediator's range of skills and experience?

6. **Select a Style**


b. Does the mediator know languages? Other cultures? Other legal systems?

c. Can he or she bend an elbow easily at the polished table in private caucuses?

7. **Language**


b. *Striking up a rapport with French.*

c. The special skills of a mediator, such as languages, can be beneficial. However, as with all such choices, you should think about the likely effect of the particular skill on your advocacy position.

8. **Preparing**

a. You wouldn't go to trial without being fully prepared. Why would you go unprepared to mediation?

b. Know your case, but also think about what your negotiating strategy will be. *See* Cooley, *supra*, at 43. Try to identify the true interests that both your side and the other side have to deal with. *Id.* at 46. Know your best alternative to a negotiated settlement, and your worst alternative.
c. Make sure your client understands the process and what will happen.

d. Develop a strategic plan for the mediation.

9. **A Pre-Dispute Process**
   a. Mediation can solve disputes before the disputes blossom into expensive and lengthy lawsuits.

10. **Briefs**
    a. This is the time to do your best brief.
    b. You might consider whether you want to give a copy of the brief to the other side, as well as to the mediator. *Id.* at 60-61.
    d. Be brief, be persuasive.

11. **Opening Session**
    a. You are only partially there to persuade the mediator. Mostly you are there to persuade the other side that your offer is reasonable or theirs is not.
    b. Use exhibits to show off your preparedness.

12. **The Story Business**
    a. We're in the story business.
    b. Catharsis. Together with cash on the barrelhead, it’s what the system is about.
    c. *Never having to be in the same room together.*

13. **The Client’s Role**
    a. Ask your client to tell the story if the client is effective. If the client is well prepared and persuasive, speaking in joint session may be effective. *See* Cooley, *supra*, at 105-104. If not, save the client’s contribution for private caucus.
14. The Presence of Power

*See also* Fla. R. Civ. P. 1.720(b)(1) (Florida rules of civil procedure requiring a party representative with full settling authority to be present) *and* Katherine Hurst Miller, *Attention Decision Makers: Your Presence is Required at Mediation*, Cobb Cole (May 1, 2013), http://cobbcole.com/other/client-newsletter/2013-05/attention-decision-makers--your-presence-is-required-at-mediation.

15. General Tips

a. Things Not To Do:

   i. Joint session is not closing argument.

   ii. Don’t manipulate the mediator.

   iii. Don’t go to a rigged game.

16. The Power of the Process

a. *Why can’t I understand what this guy is saying?*

b. Sometimes, all but the gentlest assistance of the mediator is needed to come to a resolution. It is the process itself that may bring the conflict to a close.

17. Never Say Die

a. If the case doesn't settle, don’t give up. Good mediators don’t.

18. Patience

a. Timing, rhythm, pace are important in mediation.

b. Catharsis can take a while; so does acceptance.

c. Be patient.

19. Panning for Gold

a. The mediation experience can bring to the surface issues that are not in the pleadings. Sometimes these are the true issues. It takes time to release suppressed issues and emotions.
20. **Be Imaginative**

   a. *The large utility and the CEO.*
      
      i. Sometimes a resolution is easily found if you step away from the problem and exercise some perspective.

      
      i. A resolution may not seem possible in the room, but can be sought in a phone call.

21. **The Guest List**

   a. Consider whom it would be helpful for you to have at the session, and consider whom you might ask the mediator to request the other side to have present or available.

22. **Hot Docs**

   a. Sometimes it is useful to have with you at the mediation documents that are the basis of a contention you are making, or that will rebut the other side’s position.

23. **The Ghosts of Litigation Past**

   a. *Boxes and boxes and boxes. . . See Smith, supra Tales of Mediation.*

   b. Impress with preparation and organization.

   c. Let the other side know how effective you would be at trial.

24. **Joint Sessions**

   a. Consider asking what you can say that makes settlement more likely in the region that you want.

   b. “*How can you call this art?*”

25. **Disclosure**

   a. Timing the disclosure of information can be a powerful tactic, just as one move in chess can change the complexion of the game. *See Cooley, supra,* at 121.
26. **Reaching Settlement**
   
a. Consider putting your wallet away. Give thought to whether there are non-monetary issues.

27. **Other Perspectives**
   
   
i. A new perspective may allow you to come to a solution or awaken imagination.

28. **Imagination at las Cinco de la Tarde**
   
a. *At five in the afternoon.*
   

29. **The Mediator’s Proposal**
   
a. Don’t be afraid of a seeming impasse.

30. **Mea Medium Culpa**
   
a. The power of apology.
   

31. **A Few More Ideas**
   
a. Theirs, not yours -- Get the other side to see the proposed settlement as their idea.
   
b. Trees, to win the forest -- Managers understand risk-analysis decision trees because they were trained to use them in business school, and because they use them to make decisions in their enterprises.
   
c. Learn to dance -- Each step in the mediation may require some form of concession, and – some say – each step is like a move in dancing. It may be wise not to shorten the dance.
32. The Agreement

a. Ink it. Do not leave mediation after resolution unless a settlement agreement has been completed and signed.

b. Consider bringing a laptop or a flash drive with a draft of a settlement agreement.

c. The agreement might benefit, in complex negotiations, from the input of others who aren’t at the mediation. See Cooley, supra, at 155.

33. Close of Talk

I hope that these practice tips about advocacy in mediation will help you in your mediations.

You can find more information on my website -- www.robertmsmith.com.