ADVOCACY IN MEDIATIONS

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TWENTY THINGS TO THINK ABOUT

1. **Plan a Strategy With Your Client.**
   Talk about your client's goals, both monetary and non-monetary. Know what your *best alternative to a negotiated agreement* looks like, and be prepared to rethink it based on what you hear and learn at the mediation. Don't go in with a bottom line. Bottom lines are moving targets.

2. **You Can't Select Your Judge. DO Select Your Mediator.**
   Mediators come with different training, experience and predilections. Not one size fits all. Do you want a retired judge? An attorney advocate knowledgeable in the subject matter of your dispute who is willing to serve as a mediator? An attorney who serves as a full-time neutral? A non-attorney? An evaluative mediator? A facilitative mediator? A transformative mediator? A mediator who has mediated 20 times with the other side or never mediated with the other side? ASK the proposed mediator how he/she intends to conduct the mediation, what techniques he/she proposes, what roles joint and private caucuses play, and what style the mediator employs. Ask for references.

3. **Prepare Your Client.**
   This is your client's opportunity to speak to the other side and to be understood. Your client needs to be heard, that's why he hired you. It is the duty of the opposing client to listen. Your client should be prepared to speak and be able to listen. Decide what subject matter he is – and is not – going to address, and rehearse what he is going to say. The impression he makes on the opposing lawyer and that lawyer's client is every bit as important as the impression he would make on a jury.

4. **Think About Who Should Be At The Table.**
   You do not want to reach the end of the day only to find that the agreement you have reached needs the approval of a spouse, a significant other, a business colleague, or a distant adjuster who has left his office for the day. Bring the people who are necessary to making a decision to the mediation. Ask the other side whom they intend to bring and ask them whom they want *you* to bring. And assess the benefit/risk of the presence of possibly inflammatory individuals – do you want/not want the sexual harasser there, the driver of the truck that killed a child, the boss who fired your client? Don't assume you know the answer to those questions without talking to your client.

5. **Prepare Yourself.**

Mediation is not a judge-hosted hour long settlement conference where you pick up your file on the way to court. It is your chance to show the strength of your case to the other side. Know what your strengths are, and be prepared to discuss your weaknesses.

6. Prepare With The Mediator.

Plan a pre-mediation conference call with your mediator. Decide whom you want to be present at the mediation – from your side and theirs. Talk about whether you want to begin in joint caucus or each side privately with the mediator. Make sure everyone attending has cleared their calendar and that actual settlement authority is present to close the deal.

7. File A Confidential Memorandum.

Flatten the learning curve of the mediator by bringing him up to speed. Yellow- marker contract language or case law that you want her to pay particular attention to. Discuss confidentially your hot-button issues and theirs; relationship issues between you and opposing counsel; relationship issues between your client and the other side; your goals as you see them, without revealing a bottom line (bottom lines are moving targets); your client's interests and needs; the opponent's interests and needs; potential solutions other than money; perceptions of your litigation strengths and weaknesses; perceptions of opponent's litigation strengths and weaknesses; barriers to settlement.

8. First Seek To Understand, Then To Be Understood.

In order to understand both what your opponent wants and what his interests are, you have to listen carefully. Show your opponent empathy and respect, and re-phrase his concerns so he knows he has been heard. He should then do the same for you. You can disagree with what your adversary wants, but you should understand and acknowledge his point of view.

9. Know What Your BATNA And Your WATNA Are.

Your BATNA is your "Best Alternative to a Negotiated Agreement." Your WATNA is your "Worst Alternative to a Negotiated Agreement." If the deal you can strike is less attractive than the risks you face in litigation, then litigate. If litigation is less attractive – or a worse alternative to the settlement you can reach – then settle.

10. Know Your Client's Risk Preferences.

Most people would rather receive $100 than have a 20% chance of winning $1000 (the value of the latter is $200). Assess your client's tolerance for risk. No lawyer I know will guarantee a client that he will get more at trial than what a reasonable settlement offer provides. If your client is risk-averse, he would prefer settlement to risk of trial. If your client is risk-seeking, then rolling the dice – win or lose – may be something he prefers over a reasonable offer of settlement.

11. Don't Be In A Rush.

Bringing peace into the room takes time. You are not bargaining for a brass pot in a bazaar. Plan to spend as much time as necessary, and since that will inevitably be more time than you expect, have contingency plans for flights home and hotel reservations for the night. Do not schedule a court appearance or deposition for the same day.

12. Watch Your Language.

Mediation is not a bar room brawl. It is not trial advocacy. Set the tone with a cordial hello, a statement that you expect to work hard today, and that you will do everything you can to try to create a solution to the dispute. This is not a promise of settlement, just a commitment to hard work.

13. Plan an Opening Statement.

Begin with an overview of your case from your client's point of view. Touch, but do not dwell, on the legal issues. Explain the impact of what happened to your client, but avoid accusatory language and language that will evoke a hostile reaction. People who are attacked are unable to listen.

14. Talk to the Right People.

You are not in a courtroom. The mediator is not the judge. Address yourself to the clients on the other side, not to opposing counsel or to the mediator. The mediator is powerless to impose a resolution. You have to convince your adversaries that it is in your mutual interest to reach one. You and your opponents own the dispute, know more about it than anyone else, and are the best people to put it to rest.

15. Let Your Client Talk.

This is your client's "day in court", his opportunity to be heard. He needs to engage in the process and be part of it. In many ways he is a better teller of his tale than you are. He, and the client on the other side, own this dispute. They should be active participants in its settlement.

16. Avoid the "You" Word.

Of course, your adversary is an ****[expletives deleted]. After all he has sued you or you have sued him, so your mediator knows a fair amount of pain and insult has been handed out all 'round. But talk to him from your perspective. Tell him how you see the situation and what has happened to you. If you punch your finger in her face, use pejoratives liberally, and tell her just what a jerk she is, her reaction will be "fight or flight." He will either shut down and walk out, or pay you back in kind. No one can listen who is under direct attack. The point is not to minimize the fact that harm has been inflicted – contract breach, negligence, recklessness – but to show the damage that harm has caused *you*, not how evil the person is who caused it.

17. Strategize With Your Mediator.

Brainstorm possible solutions. Make lists of possible (and impossible) solutions to the problem. Throw out the ones that are obviously unacceptable to both sides. To avoid reactive devaluation, use your mediator to convey realistic proposals as a mediator's inquiry. Collaborate on the best way to make concessions and the message they convey.

18. Privately List All the Concessions You Are Willing to Make, And Then Start With The Small Ones.

Starting with single, small concessions. These need not be solely monetary. Making concessions that are not expensive to you, signals your opponent that you are willing to compromise. It sets the tone for win-win bargaining and models behavior you want your opponent to imitate. Since you also may not know what is important to your opponent, you may find that a small concession to you appears large to him and may allow you to concede less than you were otherwise wiling to do. Try to assess how your opponent

ranks the concessions you are willing to make. If he wants a concession that you would make willingly, make it reluctantly. He will value it more.

19. Prepare Strategies For Impasse.

Impasse is often a failure of energy, information or creativity. Work with your mediator to develop a going-forward plan when things bog down. Is it time for a break? A meal? A walk around the block? A cooling-off and thinking-about- options time before reconvening? Do you want your mediator to make a mediator's proposal for resolution?

20. Always Remember the Non-Monetary Extras.

Money damages are the currency of settlement. However, sometimes it takes something extra to close the deal. In a medical malpractice case, how about an oversight committee to review and recommend procedural changes? How about out-placement in a wrongful termination claim? In a purchase-supply case, how about future widget sales at a discounted price? In a wrongful death case, how about a scholarship in the decedent's name?

And now, since you have been so patient and have read all 20, a 21st tip:

21. Be Patient, Keep Faith.

Remember that resolution takes time. A "failed" mediation sheds greater light on the real obstacles to settlement. Often, the mediation begins the discussion that leads to settlement – in the next week or the next month.