ADVOCACY IN MEDIATIONS

Don't Look Down, Look Around

Vincent P. Fornias

Full Court Press

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To all those mediation participants who taught me lessons
that could never be imparted in a classroom.
You know who you are.

As I have always held it a crime to anticipate evils, I will believe it a good comfortable road until I am compelled to believe differently.

—Meriwether Lewis, on his initial encounter
with the daunting prospect of forging
a path through the Rocky Mountains
in his Corps' mission to find
a river passage to the Pacific.

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Foreword

One of my favorite TV shows was *The Masked Magician* with the subtitle *Breaking the Magician's Code*. In that short-lived series the traitor would break the unwritten rule of magicians by disclosing how their most confounding tricks were accomplished: sawing a lady in half, escaping from handcuffs, straitjackets, descending "pit and pendulum"–type contraptions, etc. While I'm sure this series gained its star performer no accolades among his peers, it certainly made for mesmerizing television.

In this book, Vince Fornias accomplishes much of the same type of goal—while hopefully avoiding the unfavorable "fallout" from his followers. In other words, we get the inside scoop on not only how to participate in a mediation, but how a seasoned mediator, like the maestro in front of a symphony, accomplishes a result that, probably, neither of the mediation participants really knew they wanted when the mediation started.

I note that there is a program currently online touting what is termed "drop-in" mediations. This is a forum that consists of little more than a chat room—that supposedly allows mediations to come to fruition merely by each party typing in their positions and response to the others without the "middleman." It is unknown whether this program could be deemed a success but judging from the lack of proliferation of such websites, one can draw their own conclusion.

I also note that in California there is currently an "AI attorney" available, for a fee, to fight your parking/traffic

ticket for you. You have access to this robot in "real time" during your hearing and can receive ongoing advice as to how to present your case and respond to the prosecutor's. It is, again, unknown as to how effective this process will be but one should consider the propriety of putting one's pocketbook and, indeed, liberty, in the hands of a robot.

In addition to giving the inside scoop on what constitutes a good mediator, Vince also provides a road map for how to approach, participate in, and conclude the mediation process.

We learn the different types of dispute resolution methods—the pluses and the minuses (chapter 1). There are tips for the newcomer to the mediation process (chapter 2). We get tips on how to choose the right mediator and what qualities to look for in a good mediator (chapter 3). We are advised as to how to prepare for a mediation and manage client expectations (chapter 4). We delve into the initial stages of the mediation and some "dos and don't evers" (chapter 5). We are cautioned about behavior, strategy, and bargaining tactics once the parties separate into their respective caucus rooms (chapter 6). The book provides a discussion of mid-mediation advice such as "centering" to read the room, the mediator, and the client, and how to really listen and discern what the folks in the other room are trying to communicate (chapter 7). We approach the "lick log" (aka "sweating range") where the need to sharpen one's observation and communication skills are perhaps most important, the cards are no longer held as close to the vest and the finish line looms on the horizon beckoning like Circe (chapter 8). As the parties near the finish line—or not—there is advice as to how to anticipate how fatigue (mental and—make no mistake—physical) can cause a volatility that could blow away hours of hard work, blood, sweat, and tears—and how to deal with that and, on occasion, *use it* to one's advantage in

the negotiations. There is also practical advice as to how to ensure that once an agreement is reached, it is as binding as it can be (chapter 9). The work concludes with a discussion of the importance of ethics and professionalism both during and after the mediation. Make no mistake about it, there will be residual effects to your behavior during the mediation process as to both the mediator and the opposition. Remember, there will presumably be more mediation opportunities with both on your table in the future (chapter 10).

There is a cartoon, that I keep on my desk, that displays a cow with two parties on either end—one pulling on the horns and one pulling on the tail while, in the middle, on a milking stool, sits another figure visibly at work. Some cynic scrawled on the cartoon—"plaintiff" at the horns end and "defendant" at the business end, with "lawyer" designating the milker. There is a lot of truth in that cartoon, and, to me, it displays how important a mediation process can be.

Surely, almost everyone would agree that it is better to try to resolve problems amicably than via the court system, which (by nature and design) is adversarial and (by experience) unpredictable.

The American Board of Trial Advocates generally holds confabs at different parts of the country annually (viruses permitting). One such was held in New Orleans not long ago and involved a mock trial. As a presenter, I must confess some element of ego reared its ugly head when the "jury" that was provided for the mock trial retired to the jury room at the conclusion of the case. The deliberations were videotaped and, as all of the attorney presenters and attendees equally watched, it was difficult not to scream out in frustration. Without going into details, trust me that the ultimate decision by the "jury" had virtually nothing to do with the presentations and all of the calculated preparation that had gone into presenting them. What a humbling experience

and what an abject lesson in the importance of mediation as opposed to this incredibly inefficient and unpredictable alternative.

This book will prove useful not only to attorneys and mediators, but also to others who may be called upon to participate in or resolve disputes—such as human resource officers, magistrates, judges, and indeed, on occasion, parents.

Vince's engaging style, glib tongue, and disarming personality effectively communicates not only the "nuts and bolts" of the mediation process, but echoes his concluding advice "above all, keep your humor and your sense of the absurd."

The sign of a good mediation, after all, is that the parties will not necessarily leave ecstatic, but at least gruntled.

Charest Thibaut III
Attorney

Introduction

Rudyard Kipling, one of the British empire's most popular writers of the late nineteenth and early twentieth centuries, once wrote a poem called "If." In relevant part, it proclaims,

> If you can keep your head when all about you
> Are losing theirs and blaming it on you,
> If you can trust yourself when all men doubt you,
> But make allowance for their doubting too;
> If you can wait and not be tired by waiting,
> Or being lied about, don't deal in lies,
> Or being hated, don't give way to hating,
> And yet don't look too good, nor talk too wise:
>
> If you can dream—and not make dreams your
> master;
> If you can think—and not make thoughts your
> aim;
> If you can meet with Triumph and Disaster
> And treat those two impostors just the same;
> If you can bear to hear the truth you've spoken
> Twisted by knaves to make a trap of fools . . .

You may already know that part of this passage appears just above the Wimbledon players' locker room exit gate, their last sight before entering the portal that leads them to potential glory or shame on its hallowed grass courts.

Kipling is not around to prevent me from borrowing his inspiring words and applying them to another hotly contested arena—the conference rooms across the world where mediations are daily conducted. In fact, while taking my liberties with Mr. Kipling, I would supplement his poetry with a few additional lines:

> If herein you seek an academic dissertation
> To best represent a client at mediation
> While ignoring decades of practical experience
> On what will work and what will not—
> Then save your time, dear friend, and cease reading now:
> For this book is not for you.

Over a century ago, another immortal of British literature, one Charles Dickens, noted in *Bleak House* that "No two lawyers can talk for five minutes without coming to total disagreement." Not much has changed since he wrote these sage words, except that the over-under on this occurrence is now probably three minutes. As a result, as lawsuits mounted and dockets clogged, many methods were explored in an effort to get lawyers and the clients they represented to settle their differences without proceeding to the risks, delays, and expenses of the courtroom. Among the most revolutionary of these devices, one that mushroomed in popularity some four decades ago, involved convening a meeting that included affected parties and their lawyers. A third-party neutral listened to all sides, diffused tensions, engaged in subtle shuttle diplomacy, and eventually helped bring them to a workable consensus. Thus was born the process of mediation, a method that has evolved and mutated since its inception.

When the concept of a mediation was first introduced to me, someone who had cut his teeth in the gladiator's

arena of courthouses far and wide, I had my doubts and reservations.

With tongue somewhat firmly in cheek, I wrote a piece called "The Rules" in a local bar journal, a purported road map of ten dos and don'ts for the aspiring mediation participant:

1. Pre-mediation nutrition is essential. Serious carbo-packing should commence at least 48 hours prior to the opening session. Unless you're partial to the likes of Purina Po-Boys, you will engage enthusiastically in the traditional practice of Pre-Mediation Stuffing (PMS), involving shoving Snickers, King Dons, trail mix, and anything else you can shove into your suit pockets, much like a ground squirrel engorging its cheeks prior to a frigid day's activities. Post-Halloween mediations are particularly successful.
2. Appropriate attire is *de rigueur*. Plaintiffs themselves should be garbed in dark-pigmented mournful fabric, preferably without turquoise studs or leather. Their counsel should wear subdued tones and ditch their sneakers. Defense lawyers and their clients should dust off their car-buying ensembles, appearing as shallow-pocketed as Hank Fonda in *The Grapes of Wrath*.
3. Unless you're a certified computer nerd and are able to do more with your notebook than figure out how to open it, you will need suitable fare to while away the eons between productive discussions. Some prefer reading material ranging from *War and Peace* to Shelby Foote's *The Civil War: A Narrative* (in three volumes). Others may use the opportunity to Berlitz their way to a new language; say, Mandarin Chinese.

4. Avoid personal hygiene for at least 24 hours prior to the start. If you're one of those health nuts, then at least partake of lots of Greek food, or splash on a gallon or two of Schwegmann's bay rum. No holds are barred in the unceasing efforts to avoid that dreadful closed-door Dutch Uncle session, known as a *caucus* (Arabic, *cau* (drop) *cus* (pants)).
5. The opening statement is your best chance to create the appropriate atmosphere for fruitful movement. If you would like the day to go somewhat faster, use carefully measured power words such as "absolutely," "inconceivable," "weasel," or "Bogalusa," or phrases such as "Ready, boots? Start walkin'."
6. As noted above, private caucus invitations are like being sent to the principal's office. If you feel the mediator's icy tentacles on your shoulder, immediately claim mistaken identity. See Rule 2 above regarding mediation attire. Elvis, Jimmy Hoffa, and Princess Anastasia have been known to thrive in certain mediations.
7. If, despite your best effort, you find yourself behind closed doors with a mediator staring directly at your wallet, respond to his inevitable "dream scenario" suggestion with an effective gesture of detached incredulity. Eye-rolling is for the hopelessly uninitiated. Contemptuous snorts followed by a strongly uttered, "Excuse me, but are you on some sort of medication?" are somewhat more effective.
8. A corollary to Rule 7. At all costs, take no notes during a caucus, or risk being instantly branded as Someone Who Cares.

9. As in other competitive sports, *image is everything* during this process. If you are interested in retaining your client, do not mingle with the opposition within 100 feet of a mediation site. Instead, the enemy should be looked upon as Hirohito at Pearl Harbor or Santa Ana at The Alamo. Collegiality ain't kosher when your client's entire worldview is on the line.
10. If by chance you reach some sort of accord despite your client, strive for tasteful closure of the session. This excludes high fives and "We're not worthy" gestures, moon-walking, or animated utterances of "cha-chinnng" or "na na na na, na na na na, hey hey, goodbye."

The above was penned while I was a full-time litigator, part of which job description entailed being an advocate for my clients in hundreds of mediations. I hope I improved as their mediation mouthpiece as the years went by. Never in my wildest dreams did I foresee that as a desperate last resort, I would be asked one day in the early 1990s by a former client to serve as an actual mediator. To my utter surprise, I enjoyed the experience, and was asked to conduct others. I sought training and worked hard to build a practice. By the time I passed the torch a few years ago, I had mediated almost 4,000 cases to a conclusion. During that time that I was able to experience firsthand which lawyers were consistently successful in their mediations and which ones were not. The former list was far shorter than the latter. I have written a prior book, entitled *Now You Sue Them, Now You Don't: The Magic of Mediating* (Full Court Press, 2021), detailing what in my view makes a successful mediator. My goal in this book is somewhat different. It examines "the other side" of the conference room table, where clients

expect and deserve able and unceasing efforts by their counsel in guiding them to a successful mediation. I sincerely hope it is worth your reading.

Before we embark, there is one clarification that must be made. I have referred to all generic participants in this book in the masculine gender. My decision to do this in no way is intended to signal chauvinistic leanings. Anyone who knows me knows that I am not only color blind (literally and figuratively) but also (if there is such a term) gender blind. I have been taught many a lesson in and out of courtrooms and mediations by people of all genders. The book simply flows more smoothly and consistently if I restrict references to one gender. I appreciate your accepting this editorial decision and not letting it get in the way of the messages I intend to convey.

Advocacy in Mediations

Don't Look Down, Look Around

Chapter 1

Avoiding Costly Courtrooms

The increasingly clogged and unpredictable courtrooms of American life have been a driving force to find alternative ways to resolve disputes. These new initiatives began to produce palpable results in the corporate sector by the last couple of decades of the twentieth century. Consider:

- The FDIC adopted various forms of institutionalized Alternative Dispute Resolution (ADR) in 1991, producing savings in fees and costs that mushroomed from $325,000 in 1991 to $9.3 million two years later as a result of ADR. It also doubled its collection of revenues within two years.
- AT&T Global Information Solutions was able to close out 60% of its pending cases within a year of each case opening after instituting ADR measures. It also reduced suit filings significantly, and its outside legal costs plummeted by almost half.
- The Home Insurance Company, similarly to other insurers, instituted ADR in the early 1990s and in one year saved $6.3 million in litigation costs and reduced total employee time by some 4,960 months.

On the plaintiffs' side, ADR helped to level the playing field. No longer could corporations or insurers leverage the years and related emotional and financial costs that it might take in obtaining and collecting on a final judgment. No longer were plaintiffs doomed to a war of attrition in efforts to attain finality.

What soon became dramatically obvious was that, in contrast to the milk shake machines at your neighborhood McDonald's, ADR could be counted on to work—in a way that courtrooms no longer could.

When I speak of ADR, I am talking about much more than mediations. To better contrast the dynamics of a mediation, let us briefly explore other viable types of ADR.

Judicial Settlement Conference

This method was used long before other ADR methods became popular. Most of us have been there and done that. Either formally or informally, the judge presiding over your suit will require you to meet with him or with his magistrate in an effort to work things out short of trial. In the case of bench trials, it seems to this writer that a judge presiding over such a conference is walking an ethical tightrope in conducting such negotiations, as he may thereby become privy to matters that may never be presented as evidence should the conference fail and the matter proceed to trial. In contrast to mediations, the judge in this conference has formidable bullets in his holster. He may hint at an unfavorable ruling against a party who fails to sufficiently cooperate. Or he may postpone a much-needed trial date to further incentivize a settlement. In all, such conferences are fraught with pitfalls.

Arbitration

This essentially is the nonjudicial binding determination of a disputed matter. The matter may be presided over by either a single arbitrator or a panel of three. In the case of a panel, typically plaintiffs and defendants each pick a "neutral" panelist, with the third chosen by the two selected panelists. Some critics, perhaps cynically, suggest that the three-panelist arbitration simply increases costs, because the deciding vote will likely be cast by the third panelist not chosen by the respective parties. Despite this school of thought, three-panelist arbitrations continue to thrive, especially in high-stakes disputes involving complex issues and voluminous evidence.

All discovery and evidence presented in arbitrations is confidential to the extent allowed by law. This presents an advantage over typical judicial proceedings, wherein the hearings and any ruling are of public record.

Some observers note that more and more multi-million-dollar disputes are being handled in arbitrations, rather than judicially. Perhaps this is due not only to the benefits of confidentiality but also to the typically shorter period of time it takes to get to a decision, and the high likelihood that such a ruling is not subject to appeal, with limited exceptions.

Generally, parties arrive at arbitration in one of three ways: mandated by a presiding judge, stipulated contractually as part of a business contract, or simply by agreement. The arbitration may proceed in accordance with written rules provided by private organizations. Many arbitrations are conducted pursuant to the Revised Uniform Arbitration Act (RUAA). At present, a committee of the Louisiana State Law Institute is performing a line-by-line review of the RUAA to assure its consistency with Louisiana principles of

law and the Louisiana Arbitration Act. The finished product will be presented to the state legislature for its ultimate enactment into law. If passed, it is hoped that such a law will promote the prospect of increased national and global commerce in Louisiana.

The actual form of an arbitration decision is limited only by the creativity of the parties. For example, some parties choose a "high-low" method whereby the arbiter considers all evidence and derives a numerical finding without being informed of the pre-arbitration parameters agreed upon by the parties. Once the decision is reached, the amount coming closest to the arbitrator's independently derived number is binding upon all parties.

A close cousin to this method, used for decades in Major League Baseball salary arbitrations, involves the parties simultaneously submitting a proposed amount to the arbitrator. After reviewing all evidence, the arbitrator must choose one amount or the other, without allowance for "splitting the baby." This method inherently encourages the submitted proposals of the parties to be reasonable, so as to tempt the arbitrator to choose its numerical proposal. This method was used recently to efficiently resolve thousands of appeals over asserted financial losses caused by the massive environmental disaster involving the Deepwater Horizon oil spill in the Gulf of Mexico.

Special Masters

These individuals assist a court and counsel in many complex litigation and class action cases. Their job duties include the facilitation of discovery management and other labor-intensive file administration. The goal is to reduce the burden on the court, resulting in significantly faster case

resolutions. Among other typical duties, a special master and his staff may:

1. generate claim forms,
2. oversee testing protocols and computer modeling,
3. act as liaison between the court and the parties,
4. schedule discovery and resolve discovery disputes,
5. maintain extensive records throughout the process,
6. create and manage allocation methods,
7. determine the nature and amount of claimant awards,
8. supervise the funding process, and
9. monitor the proper implementation of settlement compliance.

Summary Jury Trial

Think of an expedited closing argument with a mock jury, where physical evidence is allowed. This process, allowed by the Federal Rules of Civil Procedure, is a court-initiated nonbinding process in which real jurors hear abbreviated case presentations. A judge or magistrate presides over the proceeding and provides the jury with jury charges and a verdict form. Each party has a limited time, usually an hour, to present its case to the jury. No live testimony is allowed, but the judge will allow physical evidence, such as documents, to be considered by the jury in its deliberations. Lawyers are allowed to summarize relevant deposition testimony, present signed witness statements, and enter into stipulations regarding trial testimony. In general, this proceeding lasts about a day, depending on allotted time for jury charges and deliberations. Although the resulting verdict is nonbinding and is not admissible in evidence, it gives the parties a preview of what a real jury may conclude.

Early Neutral Evaluation

The parties agree upon a third-party neutral, usually someone with substantial experience and expertise in the general subject matter area involved in the dispute. Typically, the neutral will schedule a conference with lawyers for the parties to tailor the ground rules and the extent of the evaluation to the specific agreed upon needs of the parties. This includes the type of evidence to be submitted to the neutral, and reasonably accelerated deadlines for its submission. The parties also may decide whether the neutral's findings will be binding upon them. In less complex matters, submissions might be made "live" to the neutral, followed by brief closing arguments and the neutral's decision that very day. Alternatively, the neutral may be asked to compose written findings.

If the parties agree that the neutral's findings will be binding, then the case is concluded as soon as a finding is made. If they do not agree beforehand on the binding nature of a finding, then the neutral will typically announce separately and confidentially to each party what his finding is. If every party accepts the finding in confidentiality, then the finding becomes as binding and final as an arbitration decision or a mediated settlement.

Mediations

This is the reason you purchased this book. It is by far the most prominent and popular method of ADR in use today. Let us first define this process and describe its general dynamics.

Mediations are focused and accelerated settlement negotiations in a forum conducted confidentially by a third-party neutral. The matter does not become binding until a

settlement is reached. All parties are free to walk away from the proverbial table at any time until there is a mediated accord. Once that happens, the agreement becomes legally binding and enforceable.

Historically, this process has a success rate of about 80%, depending on many factors to be discussed in detail in this book.

Its success at its core is based on the isolation and separation of parties and their counsel from emotional and destructive differences in style and personality. As an ADR method, its beauty lies in what I have previously described in the "TREE" acronym:

> **T**ime—Most mediations last a day and can save years of slow and costly trudging to a trial court and appeal courts beyond.
>
> **R**isk—Good faith negotiations and a mediated settlement avoid the classic "rolling of the dice" in front of unpredictable juries and judges.
>
> **E**ducation—Each party in a mediation experiences a factual (and sometimes legal) learning curve of "the good, the bad, and the ugly" about their case.
>
> **E**motion—Each party uses the mediation process to vent their frustration, and in some cases their anguish, about their experience that brought about the suit to begin with, without exposing their feelings before a public courtroom full of strangers.

Mediations are not for every party or every dispute. But they are omnipresent and show no signs of going away. So, you owe it to yourself and your clients to be the best you can be as an essential participant in this process.

As a logical progression to his well-received book *Now You Sue Them, Now You Don't: The Magic of Mediating*, intended for would-be mediators, Vincent Fornias now redirects his focus to the lawyers who engage as advocates in mediations. From preparation to participation, this book shares the author's decades of experience in mediation to provide keen practical insights and advice. *Advocacy in Mediations: Don't Look Down, Look Around* is essential reading not only to novice advocates, but even to the most seasoned mediation participants.

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About the Author

Vincent Fornias grew up in New Orleans after he and his family fled Fidel Castro's Cuba in 1960 when he was a child. Upon graduating as valedictorian of his high school class, Fornias attended Louisiana State University and in three years obtained a degree in History magna cum laude. He then proceeded to its Law Center and graduated Order of the Coif, and was later inducted into its Hall of Fame. Following over two decades as a noted casualty trial lawyer, Fornias transitioned to the area of mediation, participating both as advocate and mediator in thousands of mediations spanning several states. He has been chosen by his peers to The Best Lawyers in America and Super Lawyers in the field of Alternative Dispute Resolution. Fornias is a sought after speaker in bar, law school, and industry settings, and has won awards for legal humor pieces that appeared for many years in various publications.

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