

Now You Sue Them,
Now You Don't

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Now You Don't
The Magic of Mediating

Vincent P. Fornias



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A Full Court Press, Fastcase, Inc., Publication.

Printed and bound in the United States of America.

10 9 8 7 6 5 4 3 2 1

ISBN (print): 978-1-949884-46-3

ISBN (online): 978-1-949884-47-0

The cover of this book features ilbusca/DigitalVision Vectors via Getty Images

*To my father, Vicente J. Fornias,
for his unwavering work ethic, and
my mother, Marta Polo Fornias,
whose optimistic soul and ribald sense of the
absurd were unmatched.*

An aging Irish priest addicted to the game of golf found himself on the 18th hole facing a daunting 200-yard approach shot over water to a narrow green. He bravely pulled his seldom used one-iron from his bag. In the middle of his downswing the heavens opened with a blinding flash of lightning and a deafening roll of thunder, splitting in half a nearby tree. The spectacle caused him to badly top his shot into the water. This produced a heretical display by the man of the cloth, ranting loudly and cursing God as he threateningly waved his club to the clouds above. His caddy, greatly alarmed, ran up to him, and yanking the club from his grasp, admonished him, "Father, have ye gone mad? You can't wave a club around like that in the middle of a thunderstorm!" The priest turned to him and mockingly declared, "Pfft. Not even God can hit a one-iron!"

—Old golf war story

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Foreword

Vince and I both grew up in New Orleans. We did not know each other until much later when we crossed paths as lawyers. We immediately found a close friendship, not just because we were both New Orleanians, but primarily because we went to rival high schools and engage in a constant banter about whose high school afforded us a better education. In New Orleans it is more important where you went to high school than where you went to college. Mine, of course, was superior, and he will have to admit that ... someday.

I have known Vince for all of our 40+ years of law practice, first as a noble adversary, and then, for the past 30 years or so until his retirement, as the best mediator in Louisiana, if not the South. If you had a tough case, with bad facts (on either side), multiple parties, intractable liens, and hard-to-deal-with clients, Vince was your go-to mediator. If it was an impossible case, you needed Vince Fornias to mediate it.

Vince was a natural problem solver, bringing to the table a lifetime of trying and mediating thousands of difficult cases, unsurpassed preparation, and an unrivaled sense of humor. These assets are essential to success in resolving disputes, especially the humor, which lightens an often lethal mood.

This book is a fascinating compendium of advice, war stories, and poignant reminiscences about how to get to a

resolution in difficult controversies with difficult people. It should be required reading for mediators, would-be mediators, judges who try to settle cases, and lawyers who mediate difficult matters.

... and it is funny.

Edward J. Walters, Jr.
August 2020

Introduction

A while back I received a mediation position paper from an experienced trial lawyer, a veteran of many courtroom settings and scores of mediations. Right smack in the middle of his submission, he made the following observation:

Plaintiff has no real loss of wages. She works in an enjoyable job. Obviously she is not an attorney. Maybe she's a mediator.

It is a fact of legal life that the vast majority of litigators—and almost all trial judges—are convinced that their easy fallback position is to be a mediator. Not so subtly, they express the attitude that mediators have hit the career jackpot as under-challenged, overpaid message carriers. Perhaps this view is a symptom of feeling burned out or unappreciated in their own career choices. There is the fable of The Messiah making his long-awaited return. He notices a blind man, comforts him, and restores his vision, advising him to go in peace. Then he encounters a crippled woman, and listening to her tale of woe, miraculously cures her affliction, with the words to “go in peace.” Finally, he encounters a trial lawyer with a couple of decades of experience. He sits next to him—and both weep.

I could have been that third person many years ago. By then, I had tried my share of cases and was becoming tired and cynical of our litigation system. One day I was

summoned to a meeting among trial counsel in a products liability case in the Lafayette, Louisiana, office of the plaintiff's lawyer. When I arrived, we were all introduced to this man from Texas who called himself a professional mediator. He requested that each of us contact our respective clients—the plaintiff was already in attendance—and we proceeded to meet in a conference room and air our respective positions. He allowed the plaintiff to speak his piece with our clients on speaker phones. Then he engaged in private and confidential shuttle diplomacy with each of the lawyers and their clients. I was attending my first mediation—by accident. The matter did not settle that day, but it did so with some follow-up calls by that mediator within a matter of days. We were all impressed.

As mediations became more and more popular in the areas of personal injury and others, I attended hundreds of them advocating for my clients, both defendants and plaintiffs. Over the next few years I was exposed to a wide variety of advocacy styles and more importantly to dramatically contrasting methods used by presiding mediators. Like most other litigators, I had my short list of those with whom I felt most comfortable, because I could trust them to work hard to help settle my cases. I even wrote a cynical humor piece in a legal publication in which I described “The Rules” for surviving a typical mediation:

The Rules

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 stuff 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, *cam*-(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 world view 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, or animated utterances of

“Cha-Ching” and “Nah Nah Nah Nah, Hey Hey, Good-Bye.”

Then, one defining day, I was contacted by a client whom I had represented in many prior mediations. He made a strange and intimidating request. He informed me that the mediator on an upcoming matter had canceled out with a family emergency and asked if, after disclosing my prior representation on other cases to all parties, I was interested in being the mediator in the case. I don’t know whether it was naiveté, arrogance, insanity, or curiosity that caused me to accept the challenge. Providentially, all the parties agreed to give me a shot. That case didn’t settle—but I was hooked.

Soon I was signing up for formal mediation training and reading a lot about mediation and negotiation as time permitted in my litigation practice. I then took the next scary step, putting out “the word” among my litigation cohorts that I was interested in being considered for their mediations. I was honored to be given that opportunity by some, then by others. And now, almost before I knew it, almost 4,000 mediations later, I have passed the torch to others.

In tribute to the timeless lyrics sung by Joe South to “walk a mile in my shoes,” I humbly share with you my stories and thoughts on becoming a successful mediator.

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Chapter I

Hitting the Beachhead

Time for your first reality check? Unfortunately, many in our profession have as much chance of mediating for a living as my rescue dogs have of winning Westminster. In a subsequent chapter, you will read about certain personality traits that are crucial to succeed in the world of mediations. Without them, you face a steep uphill climb. In addition to these, your professional reputation precedes you. If right or wrong, you are regarded as untrustworthy, unfair, lazy, or all of the above, then save yourself the trouble of reading further.

Similar sobering news goes to those fresh out of law school. I have often been asked as a guest speaker at law school classes how one goes about becoming a mediator. My answer, much like the musician who yearns to get to Carnegie Hall, is to “practice, practice, then practice some more.” Basically, without the battle scars that definitively show that you’ve “been there, done that, got that holey T-shirt,” your credibility will be sorely challenged. I once analogized a mediator’s required practical background to the following recipe from my own experience:

Start with a couple of decades in courthouse trenches; bring to a boil with multiple appearances

at state and federal courts of appeal and the Louisiana Supreme Court; simmer with a graveyard of dashed hopes in most of these settings; and season to taste with service as an advocate in hundreds of mediations.

Having made this point, I do not mean to imply that experience alone will help you succeed as a mediator. There is indeed a method to the science and the art of negotiating and mediating, and that requires synthesizing your practical experience with some formal training to understand the dynamics of your task. Among many educational options (ranging from a few days to a full semester), prominently included in no particular order are Strauss Institute for Dispute Resolution at Pepperdine University School of Law; Harvard University Negotiation Project; Northwestern University; and The Association of Attorney-Mediators, based in Dallas. Additionally, private mediation firms offer their own in-house training for prospective members of their respective neutral panels.

Once these steps are taken, it's time to pound the proverbial pavement to make a niche for yourself in Mediationland. Far too many would-be mediators envision this as the simple exercise by Lucy in the *Peanuts* cartoon of hanging out a shingle proclaiming that "The [Mediator] Is In." Good luck with that. In truth, there is no such shortcut to starting and building a mediation practice. There is no substitute for personal solicitations of business from fellow attorneys (both prior allies and past opponents), members of the judiciary, and even past and present clients. These contacts can take the form of visits, personal notes, or letters, or emails. As stated before, your hope is that these gestures will be well received by a significant number of associates in the legal world who consider you able, trustworthy, hardworking, and

fair. You should also explore qualifying for bar registries that contain lists of eligible mediators in a particular district (See, for example, La. Mediation Act, La. R.S. 9:4101, et seq.). You should make yourself available to speak on the topic of mediations or negotiations for the various bar association groups as well as prominent industry groups. Do not overlook speaking in law school settings, as this is your chance to make a first impression on those about to enter the profession who may soon be looking for a mediator.

Once the door is opened, do not let it slam behind you. If you receive an assignment, prepare, work hard, do it well and with full commitment. One of my early mediations in a complicated patent infringement case went until 2:30 in the morning before the matter (thankfully) settled. I received many future referrals from those participants, who saw that as a mediator, I was “all in” with them for the duration. Good news indeed does travel at warp speed! If the matter settles, it is a good practice to follow up with a personal note thanking the lawyers for their commitment to the process. *Do not* take credit for the settlement (I often tell parties I neither take credit for a settlement nor for a failed mediation), but express your appreciation for their hard work in the process and for giving you the opportunity to be of some assistance in their efforts.

Indeed, even if a matter does not settle at mediation, let the dust settle a few days and then routinely follow up to make absolutely certain there is no more movement that is possible. If you are told by one party that there is no further need for follow-ups, inform the other parties that it is not you who is giving up. Most parties will appreciate your continuing efforts, and will take note of it in future decisions on choosing a mediator.

