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THE ART OF PERSUASION

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THE ART OF PERSUASION IN ARBITRATION AND MEDIATION

BY A. LEE PARKS JR. AND DAVID F. WALBERT

There has been a sea change in litigation and dispute resolution during the past 25 years. Far more cases are resolved in alternative dispute resolution (ADR) than by trial, and the relative numbers continue to increase as mediation and arbitration continue to expand. Critical in all dispute resolution—traditional trial, mediation, or arbitration—is the Art of Persuasion. Collectively, the authors have been involved in well over 1,000 civil disputes, either as advocate, mediator, or arbitrator. From this practical experience, they have learned many keys to the Art of Persuasion, both in mediation and arbitration. Unsurprisingly, there is overlap in what the advocate needs to do in these two ADR methods, as well as differences inherent in the different formats of mediation and arbitration.

Regardless of these similarities and differences, it is certain that successful advocacy in ADR requires that counsel hone their Art of Persuasion just as keenly as the best of the trial lawyers from a prior generation. In this article, the authors present some of the keys to persuasion they have learned. We hope that these suggestions will help you on your way to honing your own Art of Persuasion.

ARBITRATION

By David F. Walbert

In the final analysis, the Art of Persuasion in arbitration is winning, measured by how the average lawyer would do before a typical panel of arbitrators. If you do better, that's a win. If you do worse, that's a loss.

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Simplicity. There are two big keys to winning in arbitration. The first is simplicity. You must explain simply and clearly exactly *why* your client should win. Your story, your theme, must be told so that it is understood immediately and is compelling. This story needs to be fact based. It is a story, not a legal pronouncement. Law school taught us that the law determined the outcome of cases, but we learn quickly that the facts are more what drive the outcome of cases.

Some people say that "the law follows the facts." By that, they mean that there is a legal proposition for almost anything, and judges or arbitrators apply the legal rule that justifies the outcome they "feel" is the right one based on the facts. If you can explain your case to your 15-year-old daughter or son in a few minutes and they "get it," you are on the right track. If you can't, you need to work on it until you can. This does not mean that the evidence should be artificially truncated. That will depend on the case and what is involved, but you will want your arbitrator to hear a succinct story at the outset. This story will set the arbitrator's mind to hear your evidence from the point of view you need to win.

A famous trial lawyer once explained that a case was like a diamond with a thousand facets. The advocate's job is to hold that diamond up to the sun and rotate it until the light shines through in the most resplendent way, and that is what you

should show the world. It's a good image to visualize as an advocate. How the facts are presented can give a judge, juror, or arbitrator a completely different perception of what happened and what the outcome should be.

Who is the arbitrator? The second key to winning an arbitration should be obvious, but many people give it short shrift. Just as with judges and juries, who your arbitrators are is critical. We are undergoing a massive transformation in litigation and dispute resolution. Arbitration of all kinds of cases is increasing dramatically.

Without good arbitrator selection, your advocate skill will be lost, along with your client's case.

What has not increased commensurately is a focus on "who is my arbitrator?" and "will they be right for *this* case?"

It would be nice to think that arbitration was an ideal system where informed people applied objective legal principles to the true facts. To be sure, arbitration decisions produce a narrower range of results than jury trials, but by no stretch of the imagination are all arbitrators created equal. They bring their predilections, their experience, and their grasp of the material to their decision making. Notwithstanding the importance of who the arbitrator is, arbitrator selection gets less attention than it should. In a trial, your case may be decided when the jury is picked. The same is true for arbitration.

There are several things you can do to enhance your case with good arbitrator selection and increase the chances that your arbitrator will "hear your story." If you are striking from a panel, don't treat this as a perfunctory step in the process that is not worth much time. It may be the most important thing you do, more important than any brief you file, how you prepare your witnesses, or any of the other time-consuming things you do during arbitration. Typically, you'll have some background information about a potential arbitrator's prior cases, but this is only a start. Call counsel from prior cases and talk to them about the arbitrator. Was she open-minded? Was he irritable? Or predisposed one way or the other? Beyond past service as an arbitrator, what can you learn about his or her life otherwise? In the Internet age, you can learn a lot. You should do at least this kind of research, and if the case is big enough to warrant the time and effort, do more.

There is also a second track that too few lawyers follow: agreeing to the arbitrators. Even if you have a specific selection mechanism in an arbitration agreement, the parties can agree to modify the selection method any way they want. Too many lawyers say, "The other side will never agree to that." In fact, the other side often agrees to something that may make sense for both sides. Assuming this can't happen foregoes an important opportunity to have a better panel.

More and more very complex technical cases are litigated and arbitrated. Too many times very smart judges and arbitrators are overpowered by statistical analyses or science and engineering testimony because they don't have that kind of background and simply "don't speak the language." In these cases, it is essential that arbitrators have sufficient expertise in math and science to (1) understand what you are saying; (2) understand your experts; and (3) be able to discern when the other side's experts are less than entirely accurate and candid. This does not mean the arbitrator needs to have a Ph.D. in the same field, but he or she does need to have the math and science training and facility to listen, understand, and, maybe most importantly, ask the right questions when necessary to distinguish the truth from the rest. The ideal arbitrator in these cases is an experienced trial lawyer who has a good pre-law education in science or engineering.

Some advocate a rigorous and stratified system of arbitrator selection and certification. This may be too much because having arbitrators who are experts in the exact subject matter may mean that they understand the evidence, but their own pre-conceptions play too great a role in their decision. The right balance is someone with ample litigation experience who is sufficiently grounded in math and science to follow and understand technical testimony and to learn the specifics of the issues from the experts, without bringing too much prior knowledge to the dispute.

With the right arbitrator selection, your advocacy skills can do the rest. But without good arbitrator selection, your advocate skill will be lost, along with your client's case.

MEDIATION

By A. Lee Parks Jr.

Lawyers are trained to persuade. They pride themselves on their ability to win a trial, to prevail over the most worthy opponent. But those skills, as formidable as they might be, need an adversarial format to truly shine. They believe they are at their best in a courtroom or a face-to-face negotiating session where both counsel pound the proverbial table hard as they try to force their opponent to capitulate and meet their client's demands.

Today, the most successful litigators are counselors deft in the art of mediation. Multiyear disputes costing each side hundreds of thousands of dollars in litigation fees and expenses are resolved in a day in a setting that is judge and jury free, where the parties jointly craft their compromise in an atmosphere that is more a conversation than a combat. So, how do you maximize your chances for a successful mediation?

Choice of mediator. The Art of Persuasion in mediation starts with something you could never do in litigation, where you are randomly assigned a judge. The participants pick the mediator. It is the most important and impactful decision you will

make in the process. Here is a three-step plan to help you select the right person to act as your mediator.

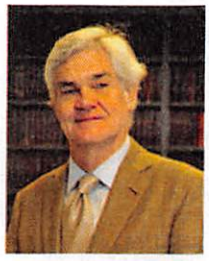
1. Choose a neutral with a recognized expertise in the substantive area where the dispute lies, a good working knowledge of recent outcomes in similar cases, and familiarity with your forum and judge/arbitrator. Knowledge is power in mediation.
2. Look for someone the other side will listen to and respect. One big mistake lawyers sometimes make is trying to persuade opposing counsel to go with a mediator they privately believe might "favor" their side of the case. It is unrealistic to expect a quality neutral to have a bias in this regard.
3. Engage your clients in vetting the possible candidates so they become invested in the success of the mediation early on and get a sense of the control the parties have over the resolution process. Client participation in the selection of the mediator also increases the chances the mediator will be able to connect with your client in a way that positively impacts the chances for settlement.

Preparation. The second ingredient in the persuasion recipe is the preparation of counsel, the client, and the mediator. This starts with the submission of a great mediation statement that is not consumed with nuanced arguments on the merits but instead arms the mediator with ideas about creative solutions to the sticking points that might hamper settlement. Educate your mediator about how the dispute ended up in litigation and the major obstacles that have blocked resolution to date. Give your mediator a heads-up if emotions are running high—this is a problem the mediator will want to tackle early on. Lastly, if you need the mediator's help in managing your client's expectations, give your mediator a call to discuss the problem and strategize how the mediator can collaborate with counsel to focus the client on all the benefits of settlement counter-offers in the caucuses.

Helpful mediation statements are pragmatic. They focus more on deal points than the legal issues. For example, if insurance is involved, your mediator will want access to the adjuster and coverage counsel if there are issues in that regard. Are there non-monetary settlement terms that impact value independent of the merits of the legal claim, and when is the best time to raise them? A good example of how a non-monetary issue can drive the monetary value of a claim is in sexual harassment cases where defendants' desire for confidentiality is uppermost in their mind. But the defendant sometimes decides not to push the issue at the outset for fear it will dramatically drive up the price of settlement. Work with your mediator in confidence to develop a strategy that will address hot-button issues early on and not leave them lingering until the end of the day when they could cause an impasse because a critical non-monetary term was not baked into case valuation from the outset.

The Art of Persuasion in mediation also requires you to prepare your client for the negotiation process. Lawyers are generally very good at making their clients feel supremely confident about their case. But don't wait until the day of the mediation to tell them the positions on value set forth in the initial demand letters and early counter-proposals are often best-case scenarios, not pragmatic settlement valuations. Your clients must understand from the outset they will need to make appropriate concessions as the mediation progresses. All too often, clients come to mediations unaware of the bargaining process, the use of caucuses as a way to progressively bring parties to a closer deal. Clients becomes frustrated by the constant request that they increase or decrease their last settlement proposal. It is important you involve your client in the negotiating strategy so they understand "how the game is played." Counsel must avoid the urge to revert to a litigation mentality on the eve of the mediation and oversell the plaintiff on the value of the claim, or the defendant on the quality of the defenses. Risk drives settlement.

Finally, the most persuasive counsel at mediation truly understands the transformation in perspective when you go from litigation, which is only about the past, to mediation, which is only about the future. There is irrefutable logic, and thus persuasion, when you invite the parties to assess a proposed settlement in terms of how it will affect their future. It is like asking them to look out their windshield rather than their rearview mirror as they continue their journey through life. Do they want to stay mired in the past, obsessing over past grievances, or focus on all the things they could accomplish once they repurpose the considerable resources and emotional energy being expended in the litigation into building a better future? Remember, settlement can be a life-changing decision for clients. In important ways, they need you to guide them over the bridge to tomorrow, at a comfortable pace, by giving them permission to leave you, and the litigation, behind. ■



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