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When the mediator is the problem: Top 10 mediation disasters

A look at preventing and responding to mediators' shortcomings

Every trial lawyer has a mediation horror story. Some mediation failures are plainly the responsibility of counsel, while others rest squarely on the mediator's shoulders. This article focuses on mediation disasters caused by or contributed to by the mediator and how the advocate can recover during the course of the mediation and prevent problems in future mediations.

1. Mediator isn't prepared

Example: It's Tuesday morning; everyone is ready to start a joint session in a complex business case. You spent all day Monday meeting with your client and his accountant to review and organize your presentation and strategy for the mediation. The mediator casually takes the seat at the head of the table and without opening the file says, "Well counsel, tell me about this case." You have a sinking feeling, but proceed. As the joint session unfolds and the mediator asks questions, it becomes clear to you and your opponent that the mediator has not read the briefs. Now what?

Response: When dealing with difficult interpersonal situations try to "confront the issue, not the person." Look for a private moment to take the mediator aside and let him know how important this mediation is to you and your client. It's okay to let a little disappointment creep into your voice as you point out the critical sections of the brief or key exhibits. Gently suggest that a reread of that material would be helpful in making progress with the other side. Ask if there are details that you can fill in. In the worst case you will have to conduct a short case tutorial or suggest that he take a little time to absorb the details of the case.

Prevention: Assuming your brief was filed on time, call or send an e-mail two or three days before the mediation, asking if the brief was received. Try to start a discussion of the case's highlights, factually and legally. Offer to be available to answer questions before the mediation. This serves as a reminder that you expect the briefs to be read and impliedly challenges the mediator to be prepared.

Make your briefs reader-friendly, using captions to break the brief into easy-to-read sections. If you are going to revise the opposition to the motion for summary judgment into the mediation brief, the summary of argument and factual recitation with an added damage section should be more than enough. If you refer to exhibits, use yellow highlighter to set-off key material. Charts, family trees, casts of characters and chronologies make a brief easy to read, absorb and retain.

2. Mediator has no plan

Example: It's noon and the mediation is drifting, going nowhere fast. Even though trial lawyers and their clients do not want to be told what to do, they expect the mediator to have a plan and coach the deal to closing.

Response: Mediators' best practices suggest that the mediator ask the parties how they got to the mediation and what has happened in the past that the current negotiation can be built on. When you do not hear these types of process-probing questions, consider taking the mediator aside (are you sensing a pattern here?) and asking how we will move the mediation along. You will probably receive a more constructive response by confronting the mediator in private.

Also, you need the mediator to retain as much credibility as possible with your client or you sabotage the prospects for her future efficacy that day.

Prevention: If the deal is more complicated than money, a release and dismissal, involves difficult personalities or highly charged emotions, it is best to call the mediator after she has read the briefs and before the mediation to discuss the issues and brainstorm the mediation plan.

3. Mediator doesn't get it

Example: In caucus session, the mediator reinterprets the case to mediator's point of view, in effect hijacking your presentation. Rather than discussing the facts and issues, he derides your case and tries to persuade you that you are wrong without any real analysis.

Response: Step back and ask who doesn't get it, the mediator or me? If it's the mediator, why doesn't the mediator understand my case? See Number 1 above, maybe he didn't read the briefs. He may not be an expert in the subject matter or he is an expert and is not paying attention. He is not engaged in the process or is simply not bright enough to grasp the complexity of the case. No matter the cause, go back to basics. Say something like, "We don't seem to be communicating; I think this is a case with serious exposure." Then relate your case from a different point of view or with a new communication method like a chart or diagram.

Allow for the possibility that it is you who does not get it. To find out if you are part of the problem, ask questions, and don't become defensive. The mediator may be trying to tell you something

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but does not have a communication style that matches yours. Try to engage the mediator in a detailed analysis of the troubling issue, including his view of the facts, evidence and specific cases. This is a tremendous learning opportunity. The mediation's value may be uncovering either a nugget or a fatal flaw in your case, not settling it.

If you fear the mediator is miscommunicating your message to the other side, consider asking for a joint session so you can control the communication or speak directly to opposing counsel.

Prevention: Call the mediator in advance, especially if you anticipate a certain argument or issue may be tricky, where the mediator's understanding will be critical to a productive session. This gives you an opportunity to test his comprehension of the issue and make adjustments in your brief and presentation. It also alerts the mediator that you are watching him on the important issue.

4. Neutrality problems

Example: In the middle of a joint session, the mediator begins asking you questions that appear to be helping the other side and are not neutral inquiries about the issues. This can also happen in a private caucus where instead of discussing the facts, issues or negotiation progress, the mediator begins advocating the other side's positions. NB: Be careful to distinguish mediator advocacy from a mediator's legitimate function of delivering bad news and reality testing.

Response: Take her outside and ask if she is intentionally advocating the other side's case. Explain your client's perception, that by advocating the other side's position she is not neutral and is favoring the opposition. Offer to work together to mitigate the perception of non-neutrality, perhaps by having the mediator explain to the client what she was doing and thinking; i.e., process transparency and reassure the client of the mediator's neutrality.

Prevention: Give the mediator a heads-up if the client is particularly sensitive to neutrality issues. This is often the case in highly charged emotional situations, such as inter-family business dis-

putes and employment matters. Before and during the mediation, help the client understand that the devil's advocate process and/or reality checks are a regular part of mediation. If the mediator is truly not neutral, use the techniques outlined below in "Bad behavior."

5. Confidentiality breaches

Example: During the mediation opposing counsel walks down the hall with you and casually says, "Short of trial, there is no way we are ever going to pay you \$XX for this case." With a sickening feeling you realize that the mediator has revealed your bottom line to the other side. Other equally horrible breaches of confidentiality include telling the other side about key evidence you have exclusive control over; untimely disclosure of your experts; and your client's true litigation objectives.

Response: Real-time recovery from these disasters requires extreme calm and caution. If the mediator revealed your confidences to the other side, what confidential information has he told you about their case? Mentally review the mediation and determine what you have learned about the other side's case that might have been confidential. You may have the opportunity to work the confidentially breach in reverse, to your benefit.

Ask the mediator how we are going to achieve a settlement in light of your conversation with opposing counsel, then wait patiently for the answer. Do not fill the silence and do not let the mediator off the hook. If the mediator feigns ignorance of the breach or just plain lies, you should consider terminating the mediation, writing a complaint letter to the provider and demanding a refund. If the mediator owns up to the mistake and seems to understand the gravity of the problem, by working together you may be able to find a way to salvage a deal.

Prevention: Measure what you say to the mediator. Never reveal truly confidential information until you know and can trust the mediator.

6. Mediator is a one-trick pony

Example: The mediator cannot seem to alter his style to suit the unique cir-

cumstances of the case. Typically, near the end of the day, the negotiation is stalled; neither side will move and there is no deal in sight. Out of the blue the mediator says, "I am going to make a mediator's proposal" without consulting with counsel about the idea's efficacy or getting approval for the concept. He then makes the mediator's proposal. It is not accepted, and the parties are worse off for having come to mediation because one side's position has hardened based on the mediator's proposal.

Response: Get in front of the train and try to stop it. Explain why a mediator's proposal is a bad idea and why it will not work; i.e., it will freeze one party in their position, it will embolden the side favored by the mediator's proposal and make the case more difficult to settle if the mediator's proposal is not accepted. Try to coach the mediator on impasse-breaking techniques described in the next section.

Prevention: As the negotiation unfolds, and you see that impasse may be on the horizon, start talking to the mediator about how we will work through the impasse to settlement without resorting to a mediator's proposal.

7. No value added

Example: The mediator is just a message carrier, walking back and forth taking your position and relaying the other side's. Same song, second verse for the negotiations. You are not paying \$400 to \$600 per hour for a message carrier. You need a mediator that will add value to the mediation and settlement process.

Response: A mediator adds value to the process by engaging in pointed factual and legal discussion about your case. If you are not getting engagement, analysis and testing from the mediator, ask her to outline the strongest points of your case and the strongest aspects of the other side's case. In the alternative, try to engage the mediator in discussion about the issues and challenges of experts, their analysis and presentation.

When it comes to the negotiations, you have the right to expect that a skillful mediator will guide and coach the

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negotiation process. A mediator should help calibrate your offers and negotiation movements, gently moving you toward settlement. If impasse is looming, she should suggest using alternative negotiating techniques such as bracketed proposals, changing the form of the money, focusing on deal points, anticipating allocation and tax problems and starting the deal memo and/or settlement agreement with you. If you are not getting this type of service, you will have to be your own co-mediator and coach the mediator.

Prevention: In addition to your factual and legal preparation, working with the client and experts, anticipate the course of the mediation and how the negotiation will progress. Again, consider calling or emailing the mediator to learn her style, so as to plan for challenges and problem areas.

8. Bad behavior

Example: Nobody wants to say it out loud, but we have all witnessed bad behavior from a mediator. A short highlight reel includes yelling at the parties or counsel; cultural, gender or racial insensitivity; demeaning comments directed at counsel and/or the client; and telling interminable and off-point war stories.

Response: There are four potential responses to bad behavior. First, leave. Second, “fight fire with fire,” yell back. Third, ignore it, let the community know about it and never come back to that mediator. Fourth, confront the bad behavior, not the person. An effective three-part technique is: when you (fill in bad behavior), I feel/think (fill in your reaction to the bad behavior) and I need (fill in the specific behavior you want from the mediator). For example, “When you yell at me and my client, we think you are demeaning us and our case. We need you to listen quietly and engage in a measured dialogue with us.”

Prevention: Prior to a mediation, especially if you have never used the mediator before, find out everything you

can about the mediator. Ask colleagues, the other side, check your firm’s database and put his/her name out on your organization’s listserv. Like the “one trick pony,” avoid the badly behaving mediator. There is no reason to pay good money to be abused.

9. Mismanaged time

Example: Mediations have two parts: the facts and law part and the Econ 101 part. If you spend too much time in a joint session or discussing the factual and legal issues in the case, you have no time to conduct the negotiations. This is especially a problem in a half-day, morning case, where the mediator has a case set in the afternoon.

Response: Diagnose the problem. Is the mediation a full-day case, set in half a day? If this is the case, see if you make Parkinson’s Law (work expands to fit time allotted for completion) work in reverse, contract the mediation. Alert the mediator to the problem and look for ways to compress time or skip steps. Alternatively, use the time available productively, assign homework and reset the mediation for another day.

If the problem is mediator dithering and lack of focus, you need to take a leadership role by suggesting that it is time to start the negotiations and conveying your opening position. Then set a time frame for a response from the other side. It never hurts to walk around the conference facility and see where the other side is and what the mediator is really doing while not with you and your client. Talk to opposing counsel about how to complete the mediation in the allotted time and fold her into the solution.

Prevention: When a case is set, talk with your assistant, your colleagues and the other side about how much time is necessary for the mediation. If you need a full day and the mediator only has a half day available on the only agreeable date, then coordinate with your staff and the other side to see what pre-mediation

work can be done such as exchanging initial demands and offers and/or adjusting your presentation to account for shorter time.

10. Fees and overtime billing

Example: These problems fall into two stacks, splitting the mediation fees and overtime billing after the mediation.

Response: Rarely is the mediator involved in the initial billing and division of the mediation fee between the parties. If the billing or payment problems come up during the mediation, the best approach is to openly acknowledge the situation and fold it into the overall negotiation. Overtime billing is a continuing source of aggravation for counsel and administrators. If a mediation runs overtime, ask the mediator if there will be overtime billing. If *no*, good for you and the client. If *yes*, make sure that you and the other side agree about the amount and who will pay it. Consider writing the overtime fee payment terms into the settlement agreement.

Prevention: Prior to the mediation use the mediator’s case manager to work out the fee split between the parties and make sure the billing tracks the agreement. If the case manager is not able to work out the billing issues, call opposing counsel directly and agree about fees.

Conclusion

At the end of the day, mediation is like trial work, it requires process knowledge, a command of the facts, evidence and law, well researched and written materials and above all, a skillful, flexible and effective advocate, ready to meet the challenges of a shifting process, while never losing sight of the goal of client service.

Ralph Williams, a former trial lawyer (25 years), is now a mediator (11 years) with ADR Services, Inc., in Los Angeles. He specializes in insurance, business litigation, employment and legal malpractice. The Daily Journal annually names him as one of California’s Top 40 neutrals.