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Five things mediators do that drive me crazy

Ill-chosen words and misguided actions can disturb the flow of negotiation... and don't get me started on the empathy stuff

By David Graulich

Civil mediators often write articles (you'll probably find one in this very issue) that tell plaintiffs' attorneys how to get better results from mediation. We're advised that mediation works wonderfully if we lawyers demonstrate civility, stay open to compromise, calibrate our demands and manage our clients' expectations.

Fair enough. But I'd like to turn the conference table on my mediator friends and tell *them* something: Some members of your profession do and say things that drive me absolutely bonkers.

Let me be candid: there is a small, yet significant, subset of mediators whose habits are annoying and counter-productive. Their ill-chosen words and misguided actions disturb the flow of negotiations, confuse and distract my client and, worst of all, put the plaintiff at a tactical disadvantage during a volatile situation.

Here are the top five entries on my "Don't Do This!" list for mediators:

1. The summary judgment speech

I dislike when a mediator gives an unsolicited tutorial to my client on the risks that lie in wait if Plaintiff doesn't settle and the defense makes a summary judgment motion.

Sorry, mediators, but giving that speech is *my* job. Plaintiff 's attorney is the right person to explain to plaintiff the complex technical aspects of a dispositive motion. This is especially pertinent after the California Supreme Court's terrific decision in *Williams v. Chino Valley Independent Fire District* (2015) WL964947, which reduced the cost-shifting risks to plaintiff should the defense prevail in an MSJ.

If I've gotten far enough along in the litigation process to engage the opposing party in mediation, I'm pretty confident that I can beat an MSJ. I don't want the mediator putting FUD (fear, uncertainty and doubt) in my client's mind.

2. The empathy quagmire

I've gone through mediation training, and I know that mediators learn "mirroring" techniques to build trust and cooperation. One common acronym taught in mediation training is AVECS — acknowledge, validate, empathize, clarify and summarize.

What's wrong with empathizing? Well, my gripe is when the mediator overplays the empathy schtick and converts the mediation into a kind of therapy session:

"I feel your pain."

"I hear what you are saying."

"I understand how difficult this must be for you."

Some plaintiffs are emotionally fragile – for example, targets of sexual harassment and traumatized survivors in personal injury cases. Mediators shouldn't prey on their vulnerable conditions with a faux display of understanding and compassion. Mediators, if you want to use your skills to soften somebody up, deploy your techniques on those guys across the hall.

3. The clueless neutral

I expect the mediator to read the mediation briefs – more than once. It also wouldn't hurt if they read my Complaint and other pleadings. Call me old-fashioned, but the disputants deserve a mediator whose grasp of material facts is solid.

My most frustrating experience with an uninformed Clueless Neutral was when I represented a small business owner in a dispute with his landlord over a broken freight elevator. My client operated a retail furniture store with a basement storage room; he needed the freight elevator to move recliners, sofas and cabinets to the showroom. The landlord refused to pay for elevator repairs and we went to mediation. The mediator entered the conference room and immediately said to my client with an ingratiating smile, "So, what kind of food do you serve in your restaurant?"

4. The frustrated judge

On the other end of the spectrum is the mediator who presumes to have an expert's knowledge of employment law (or whatever field of law is the focus of the mediation). This mediator aspires to an assignment to the bench, from which he or she can issue pronouncements and judicial decrees that make attorneys quiver and shiver.

The call to the bench hasn't happened, so the mediator plays judge in the mediation. I get denunciations of my theory of the case. I get long-winded lectures on why I have misread the law, and why my poor, feeble Complaint resembles Rocky Balboa after 12 rounds with Apollo Creed.

Maybe I'm using a cause of action knowing that it is marginal and will be bargained away. Maybe I have chosen a statute that is notorious for its ambiguity. Maybe the mediator is wrong (judges can get it wrong; otherwise we wouldn't have appellate courts). The point is that the mediator should be nudging the parties towards a settlement, not providing interpretations of statutes, regulations and case law. (Some mediators are retired judges – but that's the subject of another article!)

5. The fearless mind-reader

While I have worked with talented mediators, I can honestly tell you that *none of them is psychic*.

So it annoys me when the mediator talks to me privately and says, "They are really hardening over there. I think this is as high as they'll go. I can tell they are getting really angry," or other words that purport to divine the unexpressed thoughts of the opposing party.

Please, spare me the paranormal activity. Negotiation is 80 percent theater

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and 20 percent economics. Defense counsel is putting on a show, just like I am.

Smart attorneys can play a mediator like a violin. That's why I discount the mediator's subjective impressions of my opponent's intentions. Instead, I want the mediator to tell me what the defense has said, verbatim. I don't want descriptions of how they pounded the table or speculation about their innermost thoughts. To quote Jack Webb from the old *Dragnet* TV show: just the facts, ma'am.

Having told you what I don't want from a mediator, let me tell you what I do want. Actually, it's pretty simple. I want a mediator who understands the limits of a mediator's role and has the judgment, integrity, street smarts and *modesty* to perform that valuable role. That kind of mediator is worth his or her weight in gold – or whatever form of currency gets negotiated in the settlement.

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