

The myth of neutrality

If your goal is to unlock the value of your case, then understand that mediating "safely" doesn't settle cases

By Eric Ivary

In writing this article I am describing only my own personal thought processes, not to be held out as a model for how mediators should approach mediation. But I suspect this subject will have a familiar ring for most of my colleagues as we all deal with the challenges of being "neutral" in our own way. (At ADR Services where I have been a panelist for 17 years, we are all referred to as "Neutrals.") But what does the word actually mean?

In this article I am using "neutral" interchangeably with impartiality or a lack of conscious bias. Unconscious bias in oneself is a topic that whole treatises have been written about and is beyond the scope of what I'm writing about here. But recognizing a bias as it develops within the context of a case is a different matter. Whether you call it a bias, a predisposition or an opinion, every mediator has to deal with it because it can impair your effectiveness. *Recognizing* that type of bias can be done. That's the easy part. But it takes thought and effort to figure out what to do with it. For me it's a two-step process.

Step one: Recognizing your own biases

In this article I address "situational mediator bias." In other words, where a mediator comes to a strong opinion while preparing for the case. It's hard to think of your own opinion as biased if you genuinely believe it. But in a mediation context at least one side will see it that way if you just come right out with it at the start. So, I treat it as I would an actual unreasonable bias and prepare to get educated. After all, it's a process we ask our juries to go through all the time.

The way these "biases" get to the surface is from preparation, such as reading briefs or mediation statements. Something hits me the wrong way. I re-read it but still don't get it. So, I make it a point to talk to counsel about it on our pre-mediation phone call. (That's one of the reasons I do these calls in every case.)

On the call I will inquire politely but persistently about the subject that is bothering me, saying that 'I don't quite understand.' But even after some probing, I still don't hear a good explanation for what was bothering me. I know I can't solve the problem on the phone. So, as I get ready for the session, I recognize that I already think one side is *wrong* and I need to do something about

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that. This is a serious predisposition for or against one side that can impair my ability to be effective. But whether my bias is objectively right or wrong doesn't really change the dynamic. I can't *even appear* to favor one side. I learned a long time ago that if I express these opinions clumsily or too early I will appear biased. And at least one party will lose confidence in me, and more importantly, in the whole process. Remember that even the *appearance of bias* has the same effect on the parties as actual bias has. So, after a few years of trying to hide my opinions and biases, I've found a way to make them useful.

Step two: Your biases have a function. Use them

When I try to hide or suppress my actual feelings about a case, I don't feel authentic. In my case, I just come off as fake. People see through that the same way a jury does. I believe that to have integrity, I need to be the same person in every room I visit. If I don't react honestly and consistently, I won't have credibility. And worse, I will lose the parties' trust.

To give an example that might resonate with you, did you ever have to make an argument in court that you didn't believe yourself? Just because your client insisted? (I suspect this happens more often on the defense side but I hope you recognize the experience.) "Your Honor, my client feels strongly that… (fill in the blank)."

If you found it familiar, that's the same feeling I have when one side asks me to go tell the other side something I don't buy myself. But if a party insists, I'll reluctantly do as I'm asked and convey the message, knowing that it will likely backfire. Don't forget, just because *you* think your message will motivate the other side, understand that if I deliver your message to an audience I *know is unreceptive* or deliver it badly, it won't help you. It will actually do harm. And since my goal for all mediations is to settle cases, I hate to do anything that hurts the prospects of success.

I urge you to trust your mediator. He or she has traveled or Zoomed back and forth between all the rooms and knows the temperature in each. In those visits a good mediator has learned the areas the *defense has admitted in confidence are problematic*. That usually includes one-on-one conversations with the claims people who actually decide what to do. It would be a shame to waste a chance to settle your case because you insist I deliver a message that isn't targeted or will fail because the defense will find it offensive. (Or it might flop due to my poor acting skills.) I urge you to save the arguments that resonate with a jury for trial. Don't waste them on the wrong audience. If they're good, they'll remain that way. Or put another way, sometimes "they just don't get it." That's how huge verdicts are born. That is…unless you're the one that doesn't get it.

My solution: Turning my opinions into legitimate questions

Remember that your case is new to me. Most times you've been living with it for months or years. You know it far better than I possibly could in the short amount of time I have to absorb it. And also remember that everything I "know" about the case comes from what you and your opponents have told me. I have no inside or superior knowledge. A mediator's job is like meeting someone for the first time and getting a first impression. The same kind of first impression a jury might form right after you deliver your opening statements.

I often acknowledge to myself that I have a bias arising from the briefs or from our phone call on a specific case. The mediation session is the first opportunity for the mediator to share an honest reaction to your case, including those biases or opinions. That's too touchy to be handled in a phone call. But timing is everything. I generally don't introduce my impressions until we're well into it and I feel comfortable. This happens in a separate caucus (I don't do joint sessions).

My practice is to begin by asking questions, trying to make these questions as innocuous as possible at first. These questions are designed to get below the surface and deal with the realities of the case that sometimes go unrecognized. Did you consider that….? Aren't you worried someone might think…..?. These are questions that "anyone (maybe a juror) might have." Non-aggressive (hopefully) but honest questions. In this way you hear a little of my first impression and we can begin to talk honestly. At times, with enough conversation my reservations about the story can change. In my experience, in the end it's the story the jury will hear that matters most. And research has shown the jury's probably already made up their minds before they ever hear the jury instructions.

The problem with mediators is…

I recently took a straw poll among plaintiff's lawyers asking, What's the one thing that mediators do that they liked the least. I also asked the flip side, inquiring, "What do you wish that mediators did more or that they don't do?" The replies did not surprise me. They were all familiar complaints except one.* Here are a few:

"They don't close the deal";

"They give up too early";

They "phone it in";

"They fail to read the briefs or be fully prepared";

"They lean on the plaintiff but not the defense";

"They are not forceful enough in their assessments for fear of ruffling feathers because they want the repeat business";

"Failure to disclose prior co-counsel relationship with opposing counsel on the same case" (seriously?)*;

"Not discussing numbers till well into the afternoon";

"Not having a phone call ahead of the mediation";

"Not making sure the parties have the necessary information before the mediation, such as billing records, lien info etc.";

"Failure to follow up when the case doesn't settle."

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Taking risks

If there's one common theme I sensed from these responses is that, at least on the plaintiff side, people want mediators to be more engaged, more active, and better prepared. And settle cases instead of giving up. All of these remarks circle back to the theme of this article. How does a mediator do all that stuff and still come across as neutral? For me, it means taking risks.

Being neutral doesn't mean you can't use opinions, reactions or emotions, including humor where appropriate. That's all part of who we are as people. As mediators, we all have our own personality and with it come our own unique abilities as well as limitations. For example, my personality allows me to take risks. With risk comes the possibility that someone might take offense and get angry or upset. I've certainly offended a few plaintiff's counsel over the years as well as an untold number of insurance representatives. But I do it honestly and with as light a touch as I can muster. And it's been worth it. It works for me. Hurt feelings heal with time. Experience has shown me that the more active and persistent I become, the better the chance of settlement.

For me, being active means sharing my feelings, reactions and even my biases to get below the surface of the case. But I always try to do so respectfully and through questions, not pronouncements. I sometimes use the expression that "To make an omelet you have to break some eggs……so here goes." Hopefully, someone laughs.

One of my favorite mediators (and settlement conference judge) was the late Hon. Coleman Fannin. He is legendary as a mediator who used every tool, including his larger-than-life personality to settle cases. He succeeded through sheer effort and patience. And he was successful. I heard more than once from a defense lawyer on his way out, looking bewildered, wondering, "How did he get us to pay so much money?" I learned a few techniques from him, but mostly a love for what we do.

Another common complaint: "The other side isn't here in good faith."

This complaint deserves its own special treatment. "Good faith" is in the eye of the beholder. Often it boils down to the fact that the other side just doesn't see the case the same way that you do. But sometimes you're right. Sometimes the defense comes with no authority or extremely low authority. There is little the mediator can do about that ahead of the mediation without appearing biased. The best the mediator can do is to try to assure that the right people attend. By that I mean someone with the authority to actually settle the case, not just make recommendations. (Public entities are a slight exception.) But this is an important issue because even the belief on one side that the other side isn't dealing in good faith, whether correct or not, presents a challenge which needs to be dealt with or it will sabotage any mediation. This issue presents a two-way street. I hear it just as often from the defense. But regardless of who turns out to be right, when it's clear very early that the session is going nowhere, my practice is to ask the parties if they'd like to end the talks for today. I offer a credit for a return session when things fall apart within the first couple of hours.

You have lived with your case for months, perhaps even years. You may have forgotten your own first impression of your case. But it's new to me. It's not wrong for mediators to have such impressions or opinions. It's what mediators do with those impressions or opinions that is crucial for a successful mediation. Hopefully I've shown you one approach. It's personal because it's mine. If nothing else, I've disclosed how my mind works so now you know all my secrets.

You will always know more about your case

We all know that a mediation is not a trial. It's a different animal altogether. Don't forget that no matter how extensive your and the other side's briefs are, you will always know way more about your case than I do. After all, the entire universe of information I "know" about the case is what you and your opponents have told me! I have no superior knowledge of any fact or event. This is another way of saying that the only "real" case is the one that goes to trial and gets a verdict. Everything else is just a prediction. For the defense, a wrong prediction results in a larger-than-expected verdict. Or as Bill Veen once memorably put it to the defense, "Do you feel lucky?"

A runaway verdict can cause a ripple of repercussions on the defense side as well as a lot of money, but for you, a lot more life-altering consequences beyond mere money rest on how confident you are in your prediction. But then, you don't need me to tell you that, do you?

Conclusion

I enjoy this work tremendously. The more challenging, the better. Settling the "impossible" case is fulfilling work. But the process of getting there is not a pure science. It's a mixture of law, psychology, training and intuition. But like any human interaction, the process needs time. The right amount of time. Nothing can be rushed. Introducing an idea or suggestion prematurely can set any negotiations back or even sabotage them completely. But when progress halts, I am willing to take some chances. My goal is to settle cases and I make no apology for that. But over the years I've learned that mediating "safely" doesn't settle cases.


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