Mediator Techniques Abused: Avoid These at All Costs

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There are a host of things (small and large) that mediators do or don't do which can cause major problems and diminish the chances of getting past the finish line. Here is a sampling of such errors:

1) Abusing "reality testing"

One essential mediator technique is reality testing. The mediator examines a party's contentions against a background of common sense, feasibility and practicality. The technique can address a number of problems which can impede settlement, from a lawyer inexperienced in the field, or who has lost sight of the weaknesses in his case, to a client setting settlement values when the client is a stranger to the legal realm in which trial values will be determined. In reality testing the mediator asks whether the position makes sense in light of reasonable predictions as to possible and probable trial outcomes. Conducted properly, reality testing brings flexibility to previously more hardened positions. When abused, reality testing can prevent the case from settling. Abuse occurs primarily in when and how reality testing is employed.

i. The technique applied correctly

Focusing a participant on whether the trier of fact may find certain arguments or positions persuasive accomplishes two things.

First, it can "reframe" the way the participant thinks about an issue, changing the focus from "this is what is right" or "this is what really happened" to "is my position (evidence, argument) really that persuasive to others, such that they will agree with me when the case is concluded? Second, it introduces doubt into the participant's formerly more certain approach to the facts or position at issue. Each of these new perspectives can introduce flexibility into the party's position if handled correctly.

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To be an effective reality tester, the mediator must keep three things foremost in mind:

First, s/he must always preserve neutrality. To the extent the mediator is perceived during reality testing as an advocate for the opponent, the participant's reaction is much more likely to be defensive and argumentative. Instead of flexibility, this version of reality testing is likely to produce hardening and retreat into an attitude that is more self-righteous than self-appraising.

Second, even if the mediator's role as neutral is not in question, the mediator's tone and manner must remain non-confrontational. A sarcastic, overly critical, hostile or confrontational mediator becomes an opponent instead of a neutral. The result is far worse than being perceived as an advocate of the other side. It typically results in loss of all credibility and inability of the mediator to effectively proceed further in the dispute.

Third, reality testing must never occur too soon. Early in the mediation, the mediator must focus on building that relationship. The relationship if founded on listening, digesting and understanding the participant's concerns relaxes the participant who can then feel personally comfortable with the mediator. Once that is accomplished, reality testing can proceed productively on the platform of that relationship and without damage to it.

ii. Abusing the technique

a. As indicated above, abuse of the technique occurs when it is attempted too early in the process. The mediator must first establish her qualifications as a patient listener, who thoroughly understands (in a sympathetic way) the party's best case. Only then can the mediator play "devil's advocate" and challenge, even obliquely, the party's view.

b. Second, the technique is abused when the mediator challenges the party in an aggressive, belligerent or oppositional manner. The difference between proper use of reality testing and its abuse here is a matter of semantics and demeanor.

c. Third, the technique is abused when the mediator structures the reality testing such that the mediator is expressing her own opinion. Consider "are you kidding me?" as opposed to "do you think someone might look at this and conclude?"

d. It is apparent that the abuses of reality testing, like many other disastrous mediator moves, most often begin with the mediator's abandonment of strict neutrality. Where the mediator becomes an advocate or a partisan, the mediator's (and usefulness) are destroyed.

2) Going "behind the back" of a lawyer

The mediator must remain thoroughly conscious of and sensitive to the relationships among participants on the same side of a dispute. Asking abruptly (without previous discussion with counsel) to speak to a client alone, calling insurance or corporate representatives directly without introducing that as a part of the process, talking substantively to clients while the attorney is out of the room, are all dangerous and inappropriate approaches to take. The mediator will find it almost inevitably more successful to treat the attorney-client relationship as one to be supported and respected than to be sabotaged or undermined.

3) Not remaining neutral

Neutrality is at the heart of the mediator's role. One can show empathy, demonstrate full understanding of a party's position or viewpoint, or strategize with a party on how to best convince the opponent of the strength of a position all without abandoning neutrality. When the mediator begins to advocate for one party, the neutral role is thrown aside and the effectiveness of the mediator typically comes to an end. After such a point, it is problematic whether the mediator can be of further use at all.

Obvious instances of abandoning neutrality include ridiculing one party in front of the other, articulating the mediator's view that sides heavily or consistently with one party, etc.

Here, we will examine just two (there are many more) examples of a more subtle loss of neutrality:

i) Allowing the perception in private caucuses that the mediator is on the opponent's "side" of an issue, a particular position regarding a fact or a point of law, or the meritorious position of the whole negotiation.

Mediators sometimes overlook the fact that while they are active in all rooms, the party in one room has no information as to what is happening in the others. When a mediator enters the defense room after a caucus with the plaintiff, fortified with all the best plaintiff arguments and

focused on the weaknesses in the defendant's positions from plaintiff's perspective, the mediator needs to set the stage before proceeding to attack the defendant's position, even as a devil's advocate.

At least once in each separate room during the mediation, the mediator needs to remind the participants that facilitative negotiation (assuming, of course, that is what the parties and the mediator have established as the methodology) works by allowing the mediator to play the role of the absent opposition party(ies) in each room. The party needs to hear two significant point: First, that the mediator is speaking for the absent party, not herself. Second, that similar "devil's advocacy" has happened -- and will continue to happen -- in the other room(s) every bit as much as in here. Failure to communicate this will lead inexorably to the party's perception that the mediator is on the other side. Perception of lack of neutrality, if not diffused, is the functional equivalent of actual lack of neutrality.

Bear in mind that many "professional" participants (insurance carrier representatives, corporate representatives, lawyers and some parties) deal with many different mediators with different styles and approaches to the process. Yesterday, some of these participants may have been in a highly evaluative environment in which the "mediator" was indeed speaking for himself, not the other party. Also, since the mediator (not the opponent) is physically present in the room, the normal human presumption will be that the mediator is speaking from his own viewpoint, not that of the absent party. Careful communication helps to constructively revise such perceptions, which can be fatal to the mediation process.

ii) Non-neutral behavior in joint session

In private caucus, the mediator has the opportunity to "spin" or "reframe" perceptions relating to her neutrality. But in the joint session, the mediator is in the most potentially dangerous and fragile environment of the mediation. It is often tempting to try to clarify what has just been said, even to validate that the message was received by the other side. It is difficult to do so, however, without risk to the apparent neutrality of the mediator. Some general observations may be helpful:

If the mediator does engage one party in front of the other(s):

(a) The mediator must always be respectful, even if he thinks the point just made is moronic.
(b) The longer the engagement, the more risk of unwanted perception about the mediator's lack of impartiality.

(c) Ironically, even the party in whose "favor" the interaction appears may resent the mediator's lack of impartiality.

In short, such public interaction is best avoided or approached with great caution, so that risk of misperception is kept to an absolute minimum.

4) Using other party's threats as leverage

Some threats must be dealt with as an ethical issue (e.g., this author was once asked to communicate a threat of physical violence to the other party). The threats in view here, however, are of the garden-variety type ("Summary judgment will be filed tomorrow; change of venue is already drafted; complaint will be amended to allege punitive damages" etc.). Behind every threat is a risk. While the mediator should (must?) assist the party to evaluate all relevant risks, the mediator must not engage in communication of threats. The line between the two may be very thin.

The mediator must remain outside of the contest (argument, fight, disagreement). But the mediator's role requires that she constantly deliver "messages" from one party to the other. One of the primary facilitative mediatorial functions is to carry such messages (at least those constructive to resolution) so that the parties may actually negotiate with each other through the mediator. How then does the mediator keep from losing impartiality by identification with a party while at the same time effectively communicating the party's message to the other side?

The two most important tools are semantics and framing. Consider the following two examples:

i) "If you don't settle this case today, they will file a summary judgment motion tomorrow. You will have your hands full, based on the *Smith v Jones* case."

Versus the following:

ii) "Let's look at some legal issues. I want to understand all the strengths of your side of the case. It's also important that we examine together the risks in your position. What if the Judge were considering this issue say on summary judgment or in a pre-trial motion? What are the chances that you could lose that motion, in light of the *Smith v Jones* case?"

In the first case, the mediator has allowed himself to act as the conduit for a direct threat. Instead of an open-minded assessment of risk, the opponent is likely to react in gladiatorial mode. If the opponent's response to the mediator begins with the word "you", this is a clear signal that the mediator

has become identified as partisan with other side, and at least on this point has lost his neutrality.

The second example raises precisely the same risk of the summary judgment motion, but without threatening the other party. Since the mediator is not obligated to communicate everything she is told in the other room, she transforms the threat into an invitation to evaluate risk. She has preserved neutrality by keeping herself above the fray. She has also turned a destructive communication into a potentially constructive one. Indeed, this may have actually turned a threat into a reality check opportunity and increased flexibility versus creating greater intransigence.

5) Cutting off the venting party

Parties (sometimes yes, even lawyers) need to vent. It is an important part of negotiation, especially for parties who are not regular mediation participants. Even seasoned insurance professionals and corporate representatives experience the frustrations and perceived injustice of the legal system and sometimes just need to vent. One difference between facilitative and evaluative mediation is how the mediator handles venting.

For the party about to resolve a litigation that has been a focal point of life for several years, mediation is their substitute for their "day in court". In the mediator, they should find a willing and patient listener, who understands their cry for justice. The case might settle even if the mediator is impatient and interrupts a venting session;, but process satisfaction will be lowered and the mediator may find achieving settlement more difficult with a party that now dislikes him. In extreme cases, cutting off the party who is venting may actually preclude settlement where it otherwise would have occurred.

Patience and sympathy on the mediator's part can defuse a chronic driver of conflict – the belief that the litigant has not been heard or has been misunderstood. Sometimes only venting allows the party to move past venting. There is a cathartic effect to allowing the party to finally speak, and speak to someone who has empathy for the party's plight – someone who listens and understands. The catharsis gets the party past the emotional commitment to the dispute such that resolution becomes more palatable.

Where, however, a party continues to repeat the vent over and over again. the cathartic moment never occurs and the constructive purpose of venting is thwarted. In those cases, the mediator needs to question whether the party believes that he has been heard and understood. If best efforts of the mediator fail to do moderate if not eliminate the repetitive venting, it may be necessary to employ alternative, and more directive approaches.

6) Too much mediator creativity

The process belongs to the parties. Although the mediator is the guardian of the integrity of the mediation process, it is not her mediation. Keeping that principle firmly in mind avoids many problems, not least of which is the assumption of too much power or control over the means and limits of negotiation by the mediator.

Two examples should help to clarify the point:

i) Allowing or advocating cross-examination of Party A by opposing lawyer B.

This technique is sometimes employed by the "creative mediator". It ought to be avoided. The whole mediation is focused on transitioning the vision of the parties from conflict to resolution. This "technique" moves the process in exactly the wrong direction.

The genesis of the mediator's suggestion for such a session is typically dissatisfaction of B's side with A's responses or negotiating position. In other words, B communicates to the mediator that A is out of touch or "doesn't get it" or words to that effect. Essentially, B does not believe B's position has been effectively understood by A. In short, the mediated communication from B to A has failed.

Since mediated communication has failed, perhaps unmediated communication should be tried instead. Hence, the "solution" is to allow the parties to "face off". Predicated on an implied admission by the mediator that mediated communication (at least on this point) is ineffective, this technique has no place in mediation. It turns the alternative to trial into a free for all version of a trial by ambush. The mediator must find a way to make mediated communication effective instead of abandoning or even suspending the process.

It should be noted that there are times, especially in an opening joint session, when it is appropriate for counsel B to talk to party A directly. It is the tone and context of the communication which is critical. As soon as the communication begins to sound like cross-examination, the mediator has little choice but to step in and protect the party. If there is a hint of the prospect of such joint-session communication becoming adversarial, the mediator should consider meeting with counsel beforehand to set the guidelines and tone of the joint session. Allowing cross-examination of a party at the mediation may appear to help "get the party under control", but it is in virtually every case a disastrous mistake to a facilitative

mediation process. Indeed, it is more likely to exacerbate "control" issues than to resolve them.

ii) Calling witnesses and discussing the case without careful groundwork and permission

Not all instances of the mediator obtaining information from non-participants should be ruled out of order. Indeed, there are times when it is helpful to the process for the mediator to get such input. An example is the prospective testimony of a witness who has not yet been deposed but whose testimony is potentially decisive to resolution of a fact issue at trial. Although unknown, assessing the risk of such testimony may be critical to the flexibility needed in a party's settlement position.

The technique is very effective and productive in some cases. The danger is not in the mediator's communication with the witness per se, but in the genesis of the idea and the parties' involvement in the decision to employ it and the manner in which the communication occurs.

The party favored by the witness' testimony should (and typically will) suggest a private conversation with the mediator. If the mediator suggests the idea, it should first be offered to the party who would benefit from it. Unless that party endorses the approach, it should be scrapped. Next, it is important that the party who will not be favored by the witness' testimony be prepared in advance and not be surprised by the mediator's announcement of the testimony.

Note that there are many ways to resolve open evidentiary questions believed by one or both parties to be determinative, including a joint phone call to the witness on speakerphone, adjournment of the mediation to obtain formal discovery or informal consultation with the witness, and other options.

The key is the parties' involvement in whatever steps are taken. The mediator who charges off on his own is not only overly creative, but downright destructive to the process, because he has usurped the process from the parties who by rights own it.

7) Bad timing of monetary/non-monetary issues

a. Discussing money too soon.

Avoid the temptation (sometimes produced by the mediator's impatience, sometimes of a party's impatience) to discuss monetary demands and offers too soon. Once the conversation turns to money, the negotiation becomes linear. "Zero-sum" often becomes the parties' focus,

and risk evaluation becomes nearly impossible. Knowing that the financial negotiation takes the smallest amount time in the process, the mediator should be comfortable deferring it until the parties are no longer comfortable discussing everything else.

b. Discussing non-monetary issues too late.

A different danger is posed by postponing the discussion of non-monetary terms until their introduction becomes problematic to the resolution. Consider a confidentiality term which one party intends to require in the settlement agreement. It is potentially destructive and almost always unnecessary for the mediator (assuming he is aware of it) to raise the issue too soon. Most often, the requesting party will not tell the mediator of the confidentiality term until close to the end of negotiation, sometimes later than is desirable.

Good negotiation protocol requires non-monetary terms to be placed on the table early enough that they are part of the settlement negotiation. If too late, they may be treated by the other side as last-minute change of position.

The mediator should not leave the <u>timing</u> of non-monetary terms entirely to the parties. Knowing that they can be raised too early and too late in the mediation, the mediator should make sure that he knows about them early enough. Then he can strategize with the requiring party about when and how to reveal them to the other side.

"Early enough" means shortly after the negotiation has moved from rehearsing conflict to planning for resolution. Each case is of course unique in this regard, but, in general, waiting until the financial negotiation is drawing to a close is too late to introduce new substantive terms into the impending deal.

8) Abusing confidential information

The mediator must use extreme care in handling "secret" or "confidential" information. Every mediator needs to carefully consider her attitude and approach to confidential information. This approach needs to be adopted, after careful reflection, as a matter of practice, apart from any particular mediation. The approach must be clearly and carefully communicated to all participants prior to commencement of mediation (no later than the opening statement) so that all participants' expectations are synchronized with respect to how the mediator intends to handle confidential information. To deserve and maintain the trust of the parties, the mediator needs to be faithful to and consistent in her own approach. Abuse of confidential information (unauthorized disclosure to opponent) is undoubtedly the most frequent complaint by participants about mediators.

A careful approach requires at least the following:

1. The mediator's presumption in caucus or private communications (everything presumed confidential or everything presumed non-confidential);
2. Communications from a party which must be communicated to the opponent (mandatory) and those which may be communicated, in the mediator's discretion (discretionary);
3. A warning to the participants: they may view information as confidential simply because they presume that the opponent is ignorant of it. With some frequency, parties in litigation know their opponent's "secrets". To preserve trust, the mediator ought to advise the participants that information regarded as "secret" may not in fact be "secret". When they later discover that the opponent knows "secret" information, they may not be as likely to assume breach of trust by the mediator.

Even with a carefully adopted approach, it is still up to the mediator to treat confidential information with great care. Listening to secrets is essential to the mediator's role. They often reveal obstacles to settlement that the mediator needs to uncover to help the parties resolve the case.

Disclosing confidential information to the opponent is the clearest, but not the only abuse. Failing to use confidential information in risk assessment with the party that provided it is also a major error.

9) Unprepared or inexperienced in subject matter of dispute

There is no excuse for being unprepared on the dispute, to the extent that the parties have made pre-mediation information available to the mediator. The

neutral should also bring to the table enough experience in the subject matter to know the terminology and be able to speak and understand the "lingo" of the case. In this author's view, subject-matter expertise beyond that point is a thoroughly debatable requirement. Many parties believe that depth in subject matter is indispensable for the mediator. No doubt there is wisdom in that view. The more the mediator knows about the area of law, prevailing case law and so forth, the better equipped he is to anticipate and deal with issues lying under the surface, separate strongly-felt legal issues from "checklist" positions and even conduct effective "reality testing" on complex issues.

On the other hand, the more expertise the mediator has, the more danger he will use his expertise to evaluate the positions of the parties as opposed to facilitate their negotiation. It is almost impossible for the mediator to avoid the temptation to become evaluative when he feels strongly that the position being advocated by counsel is over the top or utterly unwarranted, especially when the mediator knows that that counsel has depth in the field herself. In an evaluative settlement process, depth in the subject matter is extremely important. In a facilitative process, it is far less so.

In this author's view, it is far more important for the mediator to understand dispute – what drives it, maintains it, and stops it – than the subject-matter area of law underlying a particular lawsuit. Far too often, parties evaluate mediators more on their exposure to the relevant legal field than on their training and ability as dispute resolvers. The truth is that most of the information needed to debunk the opponent's position is readily apparent to the other party, and is usually enthusiastically provided to the mediator very early in the process.

10) Miscommunicating a party's offer or demand – adding or leaving out terms

Mishandling non-confidential information runs next to breaching confidences as a mediator mistake which leads to parties' dissatisfaction with the mediator and the process.

We all have less-than-perfect days. Even after sitting down in the other room, if it occurs to the mediator that s/he is unclear about a particular term, it is perfectly appropriate (and probably required) for the mediator to excuse herself and return to the proposer's room to clarify or eliminate the confusion.

The mediator should write down the terms of any complex settlement proposal, including the words which should be used to communicate it. Indeed, rehearsing proposals with the proposing party before leaving the room is almost always helpful to the process.

There is no excuse for communicating an unclear settlement offer when the mediator is aware of the ambiguity. There is likewise no excuse for not

correcting one's own mistake when it occurs. Almost every party is more than willing to overlook an error in communicating details when the mediator is forthright and contrite about the error and corrects it as soon as possible.

11) Presuming the response of a party instead of communicating as requested

Difficult communications between parties in conflict are a part of life in dispute negotiation. The mediator must not shirk the part of his job responsibility which may be called "conveying difficult messages". He must be adept at semantics, "re-framing" and other techniques which can deliver difficult substance in the most constructive way. However, the mediator must always stop short of changing the message substantively because he fears it will be difficult for the responding party to hear or accept. Indeed, basing negotiating behavior on the predicted adverse response of the opponent is a major cause of failure of negotiation. It is bad enough when the participants engage in it. The mediator must avoid such predictions entirely.

It is not the mediator's job to avoid all difficult or even potentially explosive communications between the parties. It is his job to deliver such communications (assuming they are required) in the most constructive manner possible, with careful attention to the wording and context of the delivery.

12) Mistaking the end of the workday for the "end of the day"

The length of a negotiating "day" is not necessarily related to the clock, nor to the time reserved on a mediator's calendar. Parties misjudge the time required for negotiation with surprising regularity. When "5 o'clock" arrives, or a negotiator has to leave, or a party has to leave, or the mediation cannot continue further in that session for another reason, the negotiation is not thereby ended. Rather, the negotiation "day" needs to be redefined. Instead of concluding in a calendar day, the negotiation has typically been extended over portions of multiple calendar days.

The participants, especially the negotiators, are usually extremely focused on what we might call the "micro-view" of the negotiation – that is, the details and timing and nature of each individual move in the process. The mediator must always keep in mind the "macro-view" – what some call the "view from 30,000 feet". For example, the mediator knows that any one monetary move has limited utility, even in "reading" a party's "bottom line" or presumed final resting place. Ultimately, only one position of a party is truly significant: the final position. All of the intermediate positions are only important in getting to the final position. Each of them gives clues which may encourage or discourage the other side. Each of them may foreshadow or mislead the opponent as to the final position. But the significance of all of them disappears when the parties arrive at their final positions.

It is always a profound error to misperceive the middle of a negotiation as its end. This is never more true than at the close of a particular session, or expiration of the time reserved. Focused on the macro-view, the mediator must provide the parties with momentum at the "end" of the session to propel them further in negotiation, either at another session or by caucuses or phone calls thereafter.

A closely related issue is the availability and willingness of the mediator to do follow-up work. In difficult cases, the mediator's commitment to seeing the process through is probably the only momentum that can be developed. The mediator needs to be willing to do what it takes to keep the parties moving all the way to a successful conclusion. Participants rate mediators strongly up or down based on follow-up beyond the regular mediation session.

The mediator's refusal or unwillingness to provide such essential momentum to parties otherwise pessimistic about settlement is inexcusable. Lack of follow-up is another major complaint of participants about some mediators.