Fly on the wall

7 observations on both mistakes and smart moves that attorneys make in mediation

By Nancy Neal Yeend

There are many interesting things that go on in law offices, and as a fly on the wall (i.e., a mediator) I have seen my share of exciting, sad and even funny events. Flies are great observers, since we have 4000 eyes! Residing at a law firm, I noticed that not all attorneys are happy after mediation. As I buzzed around the offices, I observed both critical mistakes and successful mediation practices. Here are some classics!

1. Mediator

I heard one attorney say, *"If I accept the mediator proposed by the other side, things will go more smoothly."*

When he returned from the mediation, he was mad, and said, *"I will never use that mediator again!"* The happier attorneys proposed a list of *standards* for selecting the mediator. I remember one attorney, Carol, mentioned that the mediator had to be *trained* as a mediator, had to have actual mediation *experience* with similar cases, and needed to have subject matter or industry *understanding*. She said that if the mediator did not know the area of law or have industry knowledge that the mediator could never appreciate the strengths of her case. Carol is always happy after her mediations, since the mediators she selects are trained, and able to overcome their urges to slip back into a previous profession's role of telling people what to do.

2. Client

I noticed that one of the happiest attorneys, John, spent more time than anyone talking with his clients. He always said that *listening* to his client was the best way to find a solution. He did a bunch of things, but always talked to his client like a friend. He asked about the person, what was important to them, and what they wanted their life to look like after the mediation. John was trying to identify his client's *decision-making criteria*. What seemed important to clients was somewhat individual, and other times depended on the case type.

Although John uses the *law* and *financial considerations* as his decision-making criteria, he says that his clients felt other things were important. One client in an ADA case wanted what happened to him to never happen to anyone else. That client's criterion was *prevention*.

According to John, *"A key component in that settlement was extensive training for employees of the offending organization."* In a personal-injury case the client not only wanted her medical bills paid, but also wanted the person who caused the injury to openly admit that he was wrong, and to apologize. Being acknowledged as not the one at fault was important to that client. Her criterion was *recognition.* In an intellectual property matter, *confidentiality* was paramount, as the corporation wanted to avoid publicity, thus averting a negative impact on stock values just before a merger.

Another group wanted to prevent copycat lawsuits, so *cost containment* was their criterion. Others said that *time* was very important and that settlement now, even if lower than a court award, would be better than waiting years for a decision or even longer if there was an appeal.

3. Analysis

As any good insect knows, you must be prepared in order to survive. Yet some attorneys fail to prepare. One of the younger attorneys,
Steve, spent a lot of time preparing for mediations. He had taken a negotiation course, and said, *"The more options I have when I walk into the mediation, the happier my client is with the experience."* Steve said that meant more referrals! One of the things I enjoyed watching Steve do was his *360° analysis*.

When Steve did the case analysis, he always did it by moving back and forth from different sides of the conference room table. On one side he would assess the case from his perspective as the lawyer for his client, and on the other side of the table he pretended to be the attorney for the other side's client. He said if there were weaknesses in his case the other side would spot it, so he wanted to identify it first, and have time to develop a way to overcome any problems.

He identifies the *facts*, both disputed and undisputed, from each side's perspective, and then he outlines the *history* of the dispute. He also considers the *chronology* of *demands* and *offers*. Steve then addresses the *strengths* and *weaknesses* of each side. He never forgets to make a list of everyone's individual decision-making *criteria* – his, the other attorney's and both of their clients. Next he identifies all the *issues* that need to be resolved, and finally he lists as many possible *options* for each one. He tries to come up

with options that might work for his client as well as acceptable to the other side. Steve says, *"The person with the most options wins!"* He also says that it is easier to think of creative options, when you are not under pressure.

4. Brief

Susan, one of the partners, always supplies the mediator with a brief. She calls it a MESS! I think she said it stood for *Mediator Education Summary Sheet*. Anyway, she would keep her mediation brief, brief! Five pages was the limit for most cases, and sometimes it went to ten for appellate mediations. Because she used the same analysis process as Steve, she was able to distill the information into a clear *roadmap*. Mediators liked having all the information presented in a clear and succinct way.

According to Susan, the MESS helped *focus* the mediator. In addition, she said that sharing a variety of options with the mediator demonstrated that settlement was her client's goal. I heard more than one attorney say that she is acting in her *client's best interest*.

5. Process

Morgan, who recently joined the firm, has lots of mediation experience, because he was trained as a mediator and mediates appellate cases. He said that over time some mediators had dispensed with an opening joint session, and others even kept everyone separated for the entire mediation.

Morgan said that cases where the mediator kept everyone separated had lower settlement rates than those where the participants had time for direct discussions. He also said that some mediators never interacted with the attorneys prior to the mediation!

He became concerned, and questioned if what some mediators were doing was even mediation. He said sometimes what was going on felt more like arbitration or a settlement conference, and once it resembled private judging! According to Morgan, clarifying the process, the mediator's role, and the parties' levels of participation prevents what he says is the *"Californication"* of mediation.

Morgan said that an initial joint session provides an opportunity for the mediator to set a positive tone: describe the process, clarify their role as a *process manager* and not a decision-maker, re-affirm the necessary parties are present, and discuss confidentiality and its limited exceptions. Morgan says that this underscores the concept of *informed consent*. He said that mediations following this format were actually shorter; participants were more likely to be civil and not as emotional. At one office meeting he said that participants were not only more likely to achieve a settlement, but also to fully carry out the terms. Morgan said, *"This brief initial opening shifts the focus from litigation and trying to defeat one another to defeating the problem!"*

After the mediator's statement, everyone was offered an opportunity to briefly *identify all issues* that need resolution in order to consider the mediation a success. All of the happy attorneys said that it was not a time to start making unrealistic demands or for theatrics. Morgan said that the "*It's my way or the highway*" mantra, which dominates litigation, does not serve the client in mediation.

Getting all the issues on the table also prevents the unprincipled negotiator from hiding the ball, and throwing out a last minute demand. Morgan said that this was an important part of the mediator's job as a *process manager – prevent impasse* from occurring. After all, mediation is the parties' last opportunity to *control* the outcome of *their dispute*. His clients usually got favorable settlements, and even if they did not get everything they wanted, they felt they had been heard and were satisfied with the process – no *buyer's remorse*!

6. Negotiation

As Adam, the attorney in the big corner office, always says, *"Remember, you hired a mediator, not a messenger."* I heard Adam say that only *seven percent* of the *communication* is the words! Wow, what is the other 93 percent? According to Adam, when the participants are kept separated, 93 percent of the message is completely lost, or is left for interpretation or translation by the mediator. He says that good negotiators *never* allow someone to speak for them. They want to *watch* and *listen* to the complete message – furtive glance between attorney and client, a face flush, a nervous tick, a wince from the insurance representative, anxious toe tapping, eye movement, voice intonation and other significant distress or acceptance signals.

Adam says that without *listening* as well as *observing* the other side, it is not possible to accurately know what was really said, or even if his message was getting through to the other side. He said that depending on the mediator to accurately translate is as reliable as the old childhood game of *"telephone."* Adam wants to hear the entire nuanced message for himself, and he wants to be sure that the other side completely understands his perspective and proposals. Adam always comes back to the office smiling.

7. Stick with it

Now, as a fly, I hate to hear the word *"stick,"* related to anything. I still have nightmares with my first encounter with flypaper! As Jennifer, the office manager, says, *"Even if the mediation does not end with a full settlement, often there is partial resolution and the issues to be litigated are narrowed."* She said that if the mediation does not end with an agreement, always *follow up!* She calls the other counsel about a week after the mediation. This usually gives everyone time to reflect and reconsider proposals and offers made during the mediation. Jennifer always starts the conversation with a question: *"What are your thoughts regarding our recent mediation?"* She knows that whoever asks the question controls the conversation – smart strategy! Jennifer said that over 80 percent of the time, her phone calls result in direct negotiations with the other side, and that in most

instances they do work out a settlement. There are also times when a second mediation session helps resolve any remaining issues.

Well, there you have it – from the fly on the wall. Good luck with your next mediation. If you stick with these seven tips, you too can be a happy attorney.


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