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Practical strategies for mediators

I know it's not my problem ... but it happened on my watch

Geoff Sharp

It is at some risk that I set out to promote my expertise in the area of what to do when mediation ends in disagreement.

Nevertheless, I dread those times when the smell of napalm hangs in the air as the parties depart the room with their final exchanges of the 'see you in court' variety ringing in my ears.

To assist my investigation of what we do as mediators when destination 'Yes' eludes us, I polled a number of experienced commercial mediators. I am indebted to my friends from Bond University in Queensland, Australia and colleagues from the International Academy of Mediators (IAM) in the US who shared with me their favourite post-mediation interventions.

First, some general themes emerged.

PUSH

PUSH refers to the Persist Until Something Happens principle. Many colleagues surprised me with their tales of perseverance – they taught me that I need to be far more persistent in closing a deal.

Some were contacting parties up to a year after the mediation had concluded to see if anything had changed subsequently to make resolution a better prospect. Mediators talked of giving counsel a 'window' to discuss the matter again with the client as well as an excuse to contact their opposite number. In other words, 'good mediators refuse to leave anyone behind'.

Steven Schwartz, an IAM immediate past president, carries a crumpled piece of paper in his wallet that has on it his cases that have not yet settled. He periodically contacts counsel involved and inquires how things are going.

Email

Email is used heavily in this area – it's cheap, non-intrusive and avoids

telephone tag. It also shows the mediator to be interested, but leaves the initiative with counsel to get the mediator back into the picture.

Because post-mediation intervention appears to be an especially delicate exercise, email provides an ability to craft a well-timed note and avoid ill-considered communications that may be abused by one party or the other in subsequent judicial proceedings.

But keep yourself safe. Do this by covering the basics, like recording that the email remains part of the mediation process and that it is confidential to the parties.

'We are done but we are not finished'

My investigations suggest that mediators are adjourning mediations, rather than terminating them.

By leaving the door ajar the parties have a way back into the room that avoids anyone having to be seen as initiating a restart.

Marketing

Many of us are finding that subsequent perseverance is a great characteristic for a mediator and that it is valued by our clients, right up there with the patience, persistence and optimism that we showed them during the session itself.

So what can we learn?

There seem to be two categories of interventions that experienced mediators use when the parties remain in dispute after mediation.¹

1. The first group is made up of interventions usually tried by the mediator at the end of the mediation session.

2. The second group of interventions is the 'morning after' type.

Some examples of these types of intervention are given below in Table 1.

Table 1: Types of intervention

Mediator's intervention	Example
Ask parties to make closing speeches	'Anything to say?' (They will repeat 'I'm right – you're wrong, I'm reasonable – you're not' but it gives another possible point of traction)
Summarise – give structure	Bite size agreements — identify areas of gridlock.
Summarise in writing	'I will send you both a 'where we ended up email' so you can reflect on it before I contact you' – send it through <i>that night</i>
Make an optimistic speech	'You will settle ... with a little more time, more information, more pain – you're not in the 10% that litigate ...'
Brainstorm process	'What will progress this negotiation?' 'I'm stuck at the moment ...'
A process speech	'I suggest you might need to go through the following steps (swap information, Bill and Mary meet)' 'Are you willing to agree to this timetable?'
Plan the next meeting	'Are you willing to meet again?' 'Can we make a time?' 'I am available ...'
Pause and think	'Let's take 15 minutes before we close, just in case' 'I will phone both of you next Friday to ask you how this can be progressed and where you've got to in your thinking ... we are all fairly tired right now'
Silence	Create awkwardness ... they may dig themselves out
Stay, threaten or beg	'I am locking the door' 'We know you won't go to war over this kind of gap ...' 'Crazy to lose this progress ...' 'Hold hands and together into the abyss ... is that what we are about?'
Just send everyone home	At least you get to see the kids for bath time
Arrange for direct contact	'Bill and Mary, can you swap phone numbers and telephone each other by midday on Friday ...' (no one has to lose face by picking up the phone as they have been told to do so by the pushy mediator)
Leave the plaintiff's offer on the table	Commit the plaintiff to the deal that they would do if it was offered and allow the defendant to go away and see if they can get there within 48 hours – this way they know where the bar is and that it cannot move up
Leave the defendant's offer on the table	Allows the plaintiff to reflect on a parting offer and they know that the bar won't go down (or the offer disappear) for 48 hours after the mediation
Short line-out (NZ and UK); Short line-up (US)	Mediator meets with key decision makers <i>only</i>
Speak to the Board	Parties agree that mediator is to speak to the Board of Directors/the Trustees ie. the parties' 'tribe' or outside constituents (after clearing issues of confidentiality, etc)

Mark Jackson-Stops from London reports that where he perceives the parties to have suffered 'equal pain' he sometimes proposes an 'equal further pain' solution. Such a proposal is sometimes made as the 'last throw' on the day but, Mark says, more often on the day after by email. The question he asks is: 'If a settlement were available to you at £xxx, would you accept, yes or no?' and indicates that their answers will be in confidence.

The secret is if one says no and the other yes, the party who answered yes will have lost nothing, their position will not have been weakened. Mark's experience is that he is much more likely to get a yes where a party knows that if they are rebuffed, the other party will never know whether they said yes or no.

Michael Landrum from Edina says he always follows up on cases that don't reach closure in the mediation. He typically sets the stage at the end with each party in caucus saying something like:

It looks like we're done, but not finished. We've made a lot of progress here today, and I think everybody gained some additional insights about this case. I also sense that it would be premature to give up, since things might look different to one or both parties after a week or so. I think it could make sense for me to follow up with you in a few days to see if anybody has any new ideas.

Michael tells people

once you get involved with me, you get rid of me in only three ways:

- you tell me you've settled it on your own;
- the jury came back with a verdict; or
- you say "quit calling me you SOB, I don't want to talk to you anymore!"

... and I can accept any of these. Would that be OK with you? In the meantime, I'd like to ask you to think about who needs to do what to close the gap, and we'll talk about that when I call.

On the other hand, *John Wade* of Bond University, talks about the wisdom of written 'diagnostic reports' after a failed session.²

One of John's insights is that a written follow-up turns a 'failed'



negotiation session into a perception of (painful) progress and provides a clear document to reflect upon rather than conflicting memories of tense spoken words.

There is no doubt, however, that these documents are tricky to put together. They must contain the right information and have the right tone and the appropriate protections around them (who gets them, how can they be used, are they protected by the mediation process, are they defamatory, what happens next?). One slip can see a mediator apportioning blame and losing the centre ground.

Finally, there is a wide divergence around billing for follow up work. Some mediators do, some mediators don't. I am in the don't camp as I like the parties to see me as a 'dog with a bone' kind of mediator.

The other thing, of course, is that there is much to be said for a failed mediation. It is usually far more

interesting than a successful one and there are always lessons there for the learning.

I guess if I had to pick only a couple of personal qualities to take to my Pacific desert island as a mediator, persistence and optimism would surely be amongst them. ●

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Endnotes

1. Thanks to John Wade and Laurence Boulle of Bond University, Queensland, Australia
2. See <<http://mediate.com/articles/bond2v2sept99.cfm>>.