



Mind of the Master Mediator



*Dear readers, this resource comprises the first compiled edition of **Mind of the Master Mediator**, a popular blog series by **David S. Ross**, a JAMS Mediator and Columbia Law School Adjunct Professor.*

The Origin

I'm fascinated by mediators. To be more precise, I'm fascinated by the best mediators. And, to be even more precise,

I'm fascinated by mediators who can, with extraordinary consistency, find ways to settle the most complicated and seemingly intractable disputes.

I call them "Master Mediators." They are the full-time JAMS neutrals who handle the most interesting and challenging cases, their overflowing caseloads a testament to consistent success and the envy of aspiring mediators, and even some established ones.

What makes them so effective? What separates them from the pack? And how do they manage to parachute into one difficult dispute after another and get everybody who's fighting to say "yes"?

These questions, and others, inspired me to find out.

Methodology and Discovery

Earlier this year I interviewed each Master Mediator—in person, in-depth and without attribution—about how and why they do what they do. Like Michelin star chefs explaining what differentiates them from thousands of other professional chefs, their answers dazzled and delighted me, making me rethink some traditional notions about how to mediate.

I asked hard questions, many quite personal, and, like any effective mediator, I persisted until I got full answers. Skilled mediators know the art of controlling information flow—how to procure relevant

information and how, when necessary, to withhold information to advance the mediation process. In the end, each Master Mediator shared his or her practice secrets, personal foibles, and unvarnished opinions on sensitive issues, sometimes to my surprise.

While they agreed on a lot, they also disagreed on a lot, and those differences could be quite sharp. This series of blog posts will explore their shared views and the possible meaning of their disagreements. Some of my conclusions may upend—or at least unsettle—conventional understanding about how and why mediation works. And that alone may provide good reason to read on.

I have been mediating complex cases at JAMS for about 30 years and teaching negotiation courses at Columbia Law School for about the same time period. So, although I understand the nuances of mediation, I didn't want to write a blog that solely focused on my own ideas about mediation. I wanted to listen, learn and broaden my perspective.

First, I identified some JAMS colleagues whom I know and respect. Each colleague has been mediating for decades, earning the confidence of lawyers around the country on both sides of the bar. You can't sustain an active mediation practice in New York City without a reputation for being whip-smart, fair, and consistently neutral.

I share my findings and feelings in this blog series that starts now and will continue throughout the year. Below I explain my interview protocol and preview the topics I will cover, each one targeting an issue that should interest in-house and outside lawyers and their clients, human resources managers, ADR teachers and researchers, as well as full-time and aspiring mediators.

If you want to understand the mediation process through the eyes of wildly busy and consistently effective Master Mediators—or you want to be more self-aware and more effective at the mediation table—this series will help you. It will provide practical advice and, I hope, stimulate conversation and further thought.

Of course, unlike when I'm mediating a case, I'm totally biased!

Meet the Master Mediators

A former stage actor who clerked for the United States Supreme Court. A male ballet dancer who performed with the famous Alvin Ailey Company. A woman without a law degree and an Ivy Leaguer who graduated cum laude from Harvard Law School. A former Summary Jury Trial Judge raised in the Midwest and a former litigator raised in Argentina and Israel.

Given their diverse backgrounds and life experiences, they each bring their own unique brand to the mediation table —each one approaches the people and process with a particular world view and a distinct personal style. And, while they all run their mediations with seemingly modest variations of the standard model of joint sessions followed by sequenced caucuses, they offer distinct, and in some cases idiosyncratic, mediation styles.

What's Next?

What's in a title? I'd say everything, and here to entice you are some of the likely topics for upcoming posts:

1. **Zeroing in on Zoom: What Good Mediators Really Think About Virtual Platforms**
2. **From Eye-Rolls to Grimaces: Understanding Body Language in Virtual Mediations**
3. **Polo Shirts, Power Ties and Pant Suits: Strategic Clothing Choices for Virtual Mediations**
4. **Bedrooms, Bookcases or Beaches: Choosing and Organizing Your Background with Purpose**
5. **Annoy the Mediator at Your Own Risk: Negotiation Tactics and Missteps to Avoid**
6. **Annoy the Mediator at Your Own Risk: Negotiation Tactics and Missteps to Avoid, Part 2**

As a former stand-up comedian who has spent a little time hanging out with other comedians, I have some views on humor.

I'm not kidding.

Prepare to laugh a little and, I hope, learn a lot as you sharpen your skills and enhance your mediation know-how. I look forward to your readership of my first installment of Mind of the Master Mediator.

Post 1: Zeroing in on Zoom: What Good Mediators Really Think About Virtual Platforms

The completely unexpected and necessary pivot to online mediation arrived in mid-March, and I firmly believe that online mediation is here to stay.

March seems like an eternity ago, and I remember being quite nervous before conducting my first virtual mediation on Zoom, what I now call

a "Zoom-Med." I'm not a techie and, in retrospect, I now realize that I had become perhaps too comfortable mediating cases in person and at JAMS, where I almost *always* settled my cases and my clients *always* got a delicious lunch.

So, I was genuinely surprised at how smoothly my first Zoom-Med went, as well as the Zoom-Meds that followed. I've also been surprised by how much clients enjoy the Zoom-Med experience, despite their understandable initial apprehension.

I've mediated all types of cases on Zoom, and believe it or not, I now train lawyers on how effectively to participate in virtual mediations. While I've developed my own personal views on the limitations and long-term potential for virtual mediations, I wanted to test those views by talking with my busiest colleagues. I had a lot of questions and was really excited to learn their unvarnished views. As a group, the Master Mediators have used Zoom and other platforms to settle hundreds of commercial, employment, personal injury and reinsurance disputes.

Perhaps not surprisingly, my colleagues fundamentally agreed with each other on some issues and sharply disagreed on others. Some of those sharp disagreements may be attributable to their different practice areas or the exigencies of a particular case. My basic takeaway, however, is that they disagreed because they approach their work — and see the world — quite differently.

In this and future posts, I will share my interview questions and, using boxing terminology, provide a summation for the collective answers:

- Unanimous Decision
- Split Decision (winner by majority)
- Draw (no clear winner)

I will also provide some color commentary based on my own experience conducting Zoom-Meds.

Are Zoom-Meds as Effective as In-Person Mediations?

(Virtually) Unanimous Decision

Not surprisingly, each Master Mediator preferred to mediate in person. While mediations always involve disputed legal and factual issues, mediation is, at its core, a human process grounded in strong feelings, biases, partisan perceptions and expectations of fairness.

Mediators want to be in the same room with the human beings in conflict so they can connect with them, build trust and use their compassion and charisma to change an unproductive adversarial dynamic into a forward-looking, problem-solving one.

Despite an understandable comfort with in-person mediation, the best mediators know how to adjust and adapt, and that's exactly what the Master Mediators are doing with Zoom-Meds. They understand that virtual mediation is better than no mediation.

Several of the Master Mediators speculated that Zoom-Meds could be more effective — and likely more enjoyable — if participants must wear masks and social distance when in-person mediations resume. I can imagine parties becoming hot under the collar *and* under the mask when tensions flare!

While most of the Master Mediators admitted feeling the same fear I did before my first Zoom-Med, they've adjusted their approaches by conducting more pre-mediation Zoom meetings with clients, and sometimes offering an optional practice session with the parties.

Front-loading the mediation process allows mediators to identify and more fully explore key issues and potential settlement barriers *before* conducting the mediation session, increasing the likelihood of an efficient, productive mediation. Front-loading the process also enables the Master Mediators to build credibility and trust with the parties, the bedrock of any effective mediation.

On balance, the Master Mediators feel increasingly comfortable with Zoom-Meds, with one suggesting that she's settling cases *more frequently* and *more efficiently*. Another mediator observed that clients who are completely unfamiliar with the Zoom platform often build trust organically as they look for technical guidance as the process unfolds.

My colleagues also shared their views on some unexpected benefits of virtual mediation, including the ease with which clients can attend and participate, and their ability to do so without incurring travel or related costs. They agreed that Zoom-Meds can be more efficient and productive because they allow increased participation by clients with authority, such as insurance claims representatives, who may not be able to attend in-person mediations.

When clients are fully engaged in the negotiation process, good mediators can more easily identify real settlement barriers, as opposed to exaggerated ones used to fortify a negotiating position. The best mediators engage lawyers *and* their clients in conversations about how to overcome those real settlement barriers, often leading to more creative and durable agreements, as well as strengthened lawyer-client relationships.

Another unexpected benefit of Zoom-Meds is that people are often more direct and transparent with the mediator, sharing more honest information sooner about their priority interests and real bottom lines. They have also tend to be more courteous to adversaries, making the process a little less emotional and a lot more enjoyable. As one Master Mediator explained, "I've experienced a deeper sense of shared humanity and connection," making the process more relaxed and creative.

As we make our way through this coronavirus pandemic, perhaps people will continue to put legal disputes into broader perspective. When parties bluff less, blame people across the table less, engage in less aggressive positional bargaining and more readily share information with the mediator, the process simply works better.

On the other hand, having a virtual mediation creates a heightened risk that a party can more easily end the process with a final offer and a threat to click a button and end the day. This risk can be mitigated if the mediator addresses it *before* the mediation by asking the parties to agree to resist any temptation to bail early. Still, effective mediators must stay alert throughout the process to identify any parties who may want to end prematurely so they can immediately explore and address their concerns.

So my own personal view that virtual mediations can be as effective as — and sometimes more effective than — in-person mediations was confirmed by the Master Mediators.

Post 2: From Eye-Rolls to Grimaces: Understanding Body Language in Virtual Mediations

Today's post explores the role of body language in virtual or remote mediations, where mediators see participants in a box and on a screen as opposed to in a chair and in person.

Understanding how mediators gather relevant information just by looking at people's facial expressions and reactions can help you become a more effective advocate and participant in virtual mediations. Below, I explain why it's crucial to be aware of your own body language, enabling you to make smart decisions that can boost your credibility, likability and persuasiveness with the mediator, as well as your clients, colleagues and adversaries.

Since JAMS began using virtual platforms exclusively in mid-March, the Master Mediators have settled hundreds of legal disputes. Importantly, they have mediated an extremely broad range of legal disputes, from personal injury to sexual harassment to complex commercial matters.

So, my findings and prescriptive thoughts relate to virtually *any type* of mediation.

As a reminder, in each post I share my interview questions and, using boxing terminology, provide a summation for the collective answers:

- Unanimous Decision
- Split Decision (winner by majority)
- Draw (no clear winner)

In last month's post, the Master Mediators weighed in on mediating using virtual platforms. While they expressed a **Unanimous** preference for in-person mediations, they all recognized that, increasingly and by continued necessity, virtual mediation offers an unexpectedly effective alternative with upsides, including no travel time or related costs. They agree that virtual mediations are becoming easier and more natural.

Interestingly, two Master Mediators felt that virtual mediations can often be more enjoyable and more efficient than in-person mediations. Participants appearing from home feel more relaxed and,

consequently, may be more transparent about what they really need to settle.

In sum, based on the collective view of the six Master Mediators — as well interviews with lawyers who have mediated virtually and my own experience conducting virtual mediations — virtual mediation works and, is here to stay.

With this in mind, I will now explore new issues particular to remote processes.

Is “Upper-Body Language” Harder to Read in Virtual Mediations?

NO — (Virtually) Unanimous Decision

Why Body Language Matters

As Charles Craver, a leading expert on the role of body language in negotiation, writes in *Effective Legal Negotiation and Settlement*: “Nonverbal communication ... constitutes a majority of the communication conveyed in a negotiation.”

To be blunt, body language matters.

And it really matters to the Master Mediators as they try to assess the credibility of plaintiffs and defendants who, if the dispute doesn't settle, will likely be witnesses in an adjudicative proceeding. Effective mediators also assess the truthfulness and credibility of negotiators. For example, when a negotiator stakes out an extreme position or declares a bottom line, the mediator must determine in real time if they really mean it. And body language can help.

The Master Mediators also read body language to understand people's feelings, such as anger or disappointment, in order to acknowledge those feelings and build rapport. Feelings play a role in every mediation, whether the dispute involves allegations of sexual harassment, former partners working through a partnership dissolution, or a straight commercial dispute where people simply feel cheated or wronged.

Good mediators show clients that they are listening closely, with curiosity and compassion.

Master Mediators Pay Close Attention to the Whole Person

While a few Master Mediators said that inconsistent statements and oral evasiveness matter more to them when assessing truthfulness and credibility, they all agreed that reading a person's body language can help a lot.

And they didn't pretend to know *how* they read body language so effectively, with one Master Mediator exclaiming “I can't articulate how I do it. I just can!”

Their extraordinary skills are likely innate, developed through years of mediation experience. Intriguingly, several Master Mediators speculated that they honed their people-reading skills as children

when they navigated complicated family dynamics, such as an overbearing or controlling parent.

Your Face Is Your Canvas — Paint It Wisely

The Master Mediators agreed that while seeing a person's entire body and observing gestures and body positions often reveal useful information about feelings or state of mind, seeing a person's face matters most. And when only a few faces are on the screen, mediators can see expressions and micro-expressions *more* easily and *more* accurately than they can in person because everything is magnified.

As one Master Mediator put it, “Eyes and mouths are most important. I see emotions on their faces, even when they try to disguise or hide them.” Another bluntly asserted, “I get as many clues from the neck up as from the whole body.”

One Master Mediator told the story of an inexperienced lawyer who rolled her eyes and grimaced whenever she heard something she disagreed with or didn't believe, perhaps lulled into complacency given the relative informality of a virtual mediation compared to court. So, the Master Mediator took her aside to explain that eye-rolls show contempt and can alienate the person who is speaking, often making them less likely to want to share information or collaborate. The young lawyer promptly stopped the eye-rolling.

Effective negotiators and advocates control what they say and how they act, balancing being firm *and* being likable. Despite experiencing strong negative feelings, they maintain their composure and calmly listen while they control natural urges to interrupt, challenge assertions or launch personal attacks.

If you want an adversary to listen to *your* point of view, it's best to lead by example by listening to *their* point of view. The same advice applies to how to interact with the mediator, with whom you want to build a positive, trusting and collaborative working relationship.

Post 3: Polo Shirts, Power Ties and Pant Suits: Strategic Clothing Choices for Virtual Mediations

Today's post explores how to best present yourself in a virtual mediation. Specifically, I tackle the issue of why what you wear is important. Yes, attire matters!

Let's start with the basics: Effective advocates in any mediation try to be perceived as credible, likable and persuasive by their clients, opposing counsel and, of course, the mediator. While what you say—and how you say it—matters most, how you look and present yourself matters more than you may think.

Most JAMS neutrals continue to mediate exclusively on virtual platforms—and most parties and counsel continue to prefer the safety and convenience of this format. So, for the foreseeable future, we'll all appear on a screen, constrained from expressing ourselves in-person but learning how to seize the online moment.

Since virtual environments limit our ability to effectively communicate and connect with people, upper-body language—the only physical information we can share—takes on heightened meaning and impact. Because of this, mediation participants should pay close attention to how they present on screen.

As a reminder of my methodology, I share my interview questions and, using boxing terminology, provide a summation for the collective answers of the six Master Mediators:

- Unanimous Decision
- Split Decision (winner by majority)
- Draw (no clear winner)

Does it really matter what you wear to a virtual mediation?

YES – Split Decision

My Personal Perspective: How You Dress Can Lead to Success

Based on my experience both as a mediator and negotiation teacher at Columbia Law School, what you choose to wear to a mediation—polo or button-down, blouse or blazer, power tie or no tie—can reveal information and send signals to every person in the mediation process, including your adversary.

Of course, as long as you remain seated while your camera is streaming, all that matters on virtual mediations is what you wear from the waist up!

Nonetheless, your clothing and jewelry choices can reveal crucial aspects of your personality, as well as your settlement intentions. Poker players wear mirrored sunglasses and hoodies for good reason: to disguise physical tells, movements or actions that may reveal their true intentions.

Mediation is simply a facilitated negotiation, and the best negotiators usually secure the best outcomes. So, when you're choosing between formal or informal clothes, expensive or simple jewelry, bright or muted colors, consider that your choices may signal how confident (or not) you are in the strength of your case and negotiating position, as well as other information you may (or may not) want to share.

As one prominent plaintiff's attorney once confided, "When I know who will be across the table, I can decide whether to wear a power tie and my Rolex -- or leave them at home in the drawer."

Smart mediation participants assess the sartorial look of their counterparts—and even the mediator—to gather useful information about their personalities and negotiating styles. Knowing what motivates other people—and what may demotivate them—can help you craft your negotiating strategy.

The Master Mediators' Perspectives – Facts, Not Fashion v. Tailoring the Tone

Let's start with the dissenters. The two Master Mediators who questioned the significance of attire mainly handle complicated, multi-party cases. They emphasize mastering the factual and legal issues and, consequently, feel less compelled to assess the meaning of wardrobe choices. Since they're hired to evaluate cases, they focus less on trying to understand personalities and more on delivering accurate evaluative feedback.

The majority of the Master Mediators, however, acknowledged the value of paying attention to clothing choices, including their own.

One of them said that she deliberately dresses formally in order to establish what she described as "process authority." Interestingly, another Master Mediator, known for his relaxed and free-wheeling style, uses his pre-mediation conference calls to encourage parties to dress *informally* because doing so "softens the entire tone of the mediation" and usually makes people "more relaxed, disclosive and open to compromise."

Regardless of the mediator's personal attire choices, several other Master Mediators also raise the topic of attire *before* the mediation session. Doing so allows the parties to assess whether they care who wears what and, if they do, to talk about it and come to an agreement. Agreeing on something—even as seemingly minor as whether to dress formally or informally—can quietly build rapport, humanizing a process in which people often demonize each other.

In addition, ensuring everybody shares the same expectations can make the mediation process feel safer and more predictable, and prevent surprises like sartorial power-plays or perceived disrespect.

Most of the Master Mediators mentioned the idea of "dressing with respect." One acknowledged that she's a "stickler for respect of the process," and several others suggested that dressing too informally—without clearing it with the group—can make people may feel disrespected, upsetting them and making it harder to settle.

A Little Story With a Big Meaning

If you doubt that clothing choices hold meaning and can influence and persuade others, I'm reminded of my time as a first-year litigation associate at Cravath, Swaine & Moore. David Boies—a former Cravath partner and one of the country's preeminent trial attorneys—always made purposeful choices about what to wear in court. He preferred light blue or striped dress shirts to formal white ones, and solid navy ties to flashy designer ones. Given how meticulously he prepared for every trial, his attire choices were surely part of a broader strategic effort to make himself appear relatable, likable and trustworthy to a jury.

Regardless, the point is clear: The most effective mediation participants know that persuasion and influence are *incremental* and that details matter, including what you wear. As one Master Mediator

put it, “I almost always learn something from clothing choices, so people should think about what they wear to a mediation.”

What’s the connecting thread?

The next time you attend a mediation, don’t blindly grab your garb! Consider the mediator and her professional style so that she feels respected and you feel connected. Counsel should think about the reputation and negotiation style of their adversary, the tone and tenor of the dispute, and the signals they may send, intentionally or otherwise, by clothing choices. Similarly, parties and witnesses should ask and heed the advice of counsel and coordinate clothing choices that support their overall mediation strategy.

Then, and only then, decide what to put on, and what to leave in the drawer.

Post 4: Bedrooms, Bookcases or Beaches: Choosing and Organizing Your Background with Purpose

Presentation Matters

Today’s post continues to explore how best to present yourself in a virtual mediation. Specifically, I address the risks and opportunities of using a virtual or actual background and provide practice tips on how to present yourself as professionally and persuasively as possible.

For a refresher on how I conduct research and present my findings, see last month’s post: [**Polo Shirts, Power Ties and Pant Suits: Strategic Clothing Choices for Virtual Mediations.**](#)

In that post, I explain the importance of carefully choosing what you wear to a virtual proceeding, as well as how to glean useful information from how other mediation participants dress. Clothing and jewelry choices provide clues about a person’s personality, priorities, self-image and, potentially, negotiating strategy.

Sophisticated mediation participants understand the importance of establishing credibility and persuasiveness, both of which must be built incrementally. Seemingly small choices add up, and what you choose to wear can influence how people perceive you. The same is true for your choice of background, as I will explain in this post.

Rethinking Your Current Approach

We’ve been Zooming for nearly eight months, so most of us have decided whether to use our favorite virtual background—a sunny beach, perhaps?—or a neatly staged corner of our kitchen or bedroom. If your current default choice is a virtual background, you should consider the strategic advantages of using a carefully crafted area of your home or office.

According to the Master Mediators, an emerging consensus from social media and social psychology research, a well-considered natural environment may help you achieve your advocacy goals in any context, including virtual mediations.

I know that change is hard!

That being said, effective mediation advocates continually reassess and recalibrate, switching gears to better advance their interests. So, keep an open mind. What you read below may prompt you to rethink your current approach.

The Master Mediators Weigh In

Do you prefer participants to appear in their natural environment or in front of a virtual background?

SPLIT DECISION

I was totally surprised at the range and intensity of the Master Mediators’ viewpoints!

One Master Mediator, known for her diplomatic demeanor, blurted out, “I think most virtual backgrounds are goofy!” Another one said she “loves” virtual backgrounds and finds real ones “distracting and too personal.” And a third Master Mediator said, “I don’t even notice—to each his own.”

Their views ran the gamut, suggesting that you should ask mediators if they have a preference. Speaking from experience, it feels good when clients ask for advice, even on straightforward issues. Besides, why would you do something that a mediator may dislike or find distracting? This is an opportunity for an easy “win.”

Despite the diversity of opinions, on balance the Master Mediators clearly prefer non-distracting and well-organized real-life backgrounds. Several pointed to common technological glitches that frequently occur with virtual backgrounds, such as people leaning back so that “their heads, or other parts of their bodies, disappear into the virtual image.” These issues can be mitigated if you have a computer with a fast processor, invest in a green screen, vigilantly download and install the latest versions of the videoconferencing software, and ensure reliable fast internet service.

Still, any unintended visual effects can undermine your presentation, distracting the mediator—and the other mediation participants—from focusing on and hearing what you’re trying to communicate. In addition, you risk signaling that you’re oblivious to—or don’t really care about—how you’re presenting yourself, making you a bit less likable and eroding your credibility.

Several Master Mediators opined that virtual backgrounds prevent them from seeing people “in their natural environment,” denying them access to useful personal information and an opportunity to connect. By design, virtual backgrounds depersonalize the mediation process. In fact, by choosing to hide your natural environment—and keep it a secret—you may even undermine people’s perception of your candor and authenticity. What else is he not sharing with me?

One Master Mediator mused, “I really enjoy seeing people in their natural spaces—it provides a sense of human connection and can spark a conversation.” Several others explained how they often

ask about framed photos or tchotchkes they see in order to build a personal connection or to ease the tension that often characterizes difficult negotiations.

For example, one mediator explained how asking a particularly zealous lawyer about a painting on her kitchen wall created an ideal opportunity to discuss something *other than* the weaknesses of her client's legal case. Connecting as fellow art lovers, not lawyers, made the process more enjoyable and, importantly, opened up a productive conversation about the case's real settlement value. (Yes, the case settled!)

Taking a Cue From Popular Politicians and Public Figures

Politicians, regardless of party affiliation, want to be listened to, liked and perceived as credible. Dr. Robert Cialdini, a best-selling author and expert on the science of persuasion and influence, writes that we are more likely to comply with people whom we like and people who present with authority. So, when you're choosing the photos, books, plants or art to comprise the overall image you want to present in a mediation, do so with purpose and attention to detail—every detail.

So, what is the best way to organize your background?

I suggest starting with the popular Twitter account Room Rater ([@ratemyskyperoom](#)), which grades the livestream backdrops of politicians and pundits on a scale of 1 to 10 based on overall aesthetics and balance, including lighting, depth, camera positioning, and plant, pillow and art arrangements.

What are the criteria for earning a perfect 10?

"We look for several common elements to increase the score," says Claude Taylor, a founder of Room Rater. "We look for the depth of a room—generally a flat background doesn't work as well. We look for color—that can be done with plants [or] artwork. We look for some personality, something that makes it less look less generic. [E]veryone should try to stage it a little bit...but it shouldn't look *too* staged." Also, be careful not to share too much personal information—some backgrounds can feel overly disclosive and oddly intimate.

Being Seen in the Best Light

Regardless of what type of background you choose, you want to control your environment. A few tips include:

- Avoid backlighting so that people can see your face.
- Buy a dimmable ring light, which provides even lighting and prevents dark shadows.
- Ensure your laptop's camera is level with your eyes—if you're using your laptop, this may mean placing it atop a stack of books. A tilted camera angle, especially one aiming up at you, can distort how you look, often in unflattering ways.
- Position yourself prominently in the camera frame to show confidence and presence.

- Don't sit too far back from the camera, which literally and figuratively distances you from the mediator and other mediation participants. In other words, don't shrink yourself.
- Don't lean into the camera. Think foreground, not forehead.

If you stick with virtual backgrounds because you like them, or economic or other circumstances prevent you from appearing in a natural environment, don't worry. Carefully selected virtual backgrounds can work fine, and many resources offer free images of virtual backgrounds, such as [unsplash.com](#).

To recap, how you look and present yourself matters, so choose your virtual or real-life background with care. If you participate in the mediation from your home or office, pay attention to the details because they matter!

Oh, and pick a comfortable chair.

Post 5: Annoy the Mediator at Your Own Risk: Negotiation Tactics and Missteps to Avoid

Rule number one in any mediation? Don't tick off the mediator.

First and foremost, effective mediation advocates *collaborate* with their mediators to prioritize and advance their client's interests. Mediators help people resolve disputes that they can't resolve themselves, organizing and managing a negotiation process that usually results in a settlement or deal. When lawyers (or their clients) negotiate in unproductive ways—making it harder than it already is to resolve a thorny dispute—the process becomes less efficient, less productive, less enjoyable and more likely to reach an impasse.

Second, according to social science research, people work better with people they like and trust. Robert Cialdini, an expert on the science of persuasion and influence, writes that we are more likely to be influenced by and comply with people we like. So, when you ask the mediator to help you achieve a certain goal at the end of a long day, you'll be better positioned to influence her—and your adversary—if you haven't breached anyone's trust or otherwise deeply disrupted the mediation process.

As Perry Rogers, NBA Hall of Famer Shaquille O'Neal's agent, once said: "My negotiating advice to getting a deal done is to be likeable. Being obnoxious is easy."

Mediators' Top Pet Peeves

Mediators are preternaturally patient people who remain calm and focused in complicated, emotionally charged situations. But here's a little secret—even Master Mediators have pet peeves.

So, what annoys or aggravates mediators the most?

I presented each Master Mediator with my "Top Ten List of Unhelpful Behaviors" that make the mediation process less enjoyable, less

efficient and less productive. When parties commit too many of these “process no-no’s”—often because they think a particular behavior provides a negotiating advantage—they risk alienating the mediator and the other side, leading to suboptimal outcomes or, worst-case scenario, an irreversible impasse.

The best mediators remain calm and decisive as they identify and address process roadblocks, such as strong personalities or irrational intransigence. Nonetheless, we all have our triggers.

So, I asked each Master Mediator to rank each unhelpful behavior on a 1-10 scale, from least to most problematic. Below I share the Top Three Unhelpful Behaviors.

Unhelpful Behaviors	How Annoying?
	1 = not at all: 10 = very
#1 Important Person With Authority Is “Unreachable”	8.50
#2 Hyper-Aggressive Advocate	7.25
#3 Lack of Preparation	6.83

#1 Important Person With Authority Is “Unreachable”

The Master Mediators resoundingly agreed that not having a person with authority at the mediation session, or easily reachable, presents the biggest obstacle to settlement. To cement any negotiated deal, the mediator must secure a yes from the people with the power to authorize a yes. That’s why good mediators always confirm—sometimes twice—that all necessary decision makers, with appropriate levels of authority, will attend the mediation session or, at a minimum, be reachable by phone or email.

Sometimes, a decision-maker suddenly becomes unavailable for legitimate reasons. Many years ago, I mediated a case where the plaintiff had to leave the mediation to take her son to the hospital. Obviously, the defendant understood and agreed to reconvene the next day.

More often, however, one side announces mid-mediation that a key decision-maker “can’t be reached,” making it impossible to close an achievable deal. These frustrating situations usually represent either a failure to anticipate the participant’s unavailability *or* a purposeful negotiation tactic designed to scuttle or delay settlement in an effort to secure more favorable deal terms at a later date.

As one usually diplomatic Master Mediator bluntly said, “It’s not just *annoying*. It’s actually super-annoying.” And it’s super-annoying because the person’s unavailability makes settlement that day impossible, creating an unnecessary impasse that can prove hard to overcome once mediation momentum is lost.

#2 Hyper-Aggressive Advocate

The Master Mediators dislike hyper-aggressive negotiating behaviors because they undermine a principled mediation process by making it less collaborative, less efficient and less productive. In fact, one Master Mediator described hyper-aggressive advocacy as “the single most problematic dynamic in any mediation,” especially when it escalates late in the day. Even the outlier who said that she “can usually work [her] way out of this situation” acknowledged that overly aggressive behavior “can, in some situations, present a very serious problem.”

The Master Mediators shared different reasons for their aversion to hyper-aggressive advocates. One said, “Hyper-aggressive belligerence annoys me personally. I rated it high because it usually goes along with trying to prevent me from talking directly to parties.” Another observed that such tactics are particularly problematic because they often signal a lack of genuine interest in settlement. One Master Mediators lamented that managing unproductive negotiating antics requires energy and focus better spent on more productive work, like finding creative solutions that work for all the parties.

To be clear, effective mediation advocates should negotiate assertively to get the best possible deal for their clients. Experienced advocates execute negotiating strategies designed to meet their client’s goals, but they adjust those goals as they learn new information and digest mediator feedback.

The Master Mediators respect strong advocacy but become concerned when negotiation tactics become *too aggressive*, alienating other mediation participants and unsettling the process. Such tactics include wildly high opening offers (or wildly low counteroffers) coupled with irrational intransigence. Other unhelpful behaviors include hardball tactics such as stonewalling—refusing to make a counteroffer or refusing to share relevant and discoverable information, for example—intentionally mischaracterizing prior conversations and making “exploding offers” that expire after unreasonably short deadlines.

When advocates unrelentingly persist in using these tactics, they alienate the people across the table by sowing dislike and distrust. Mediators work hard to establish trust between the parties. As the saying goes, “Trust is gained in drops but lost in buckets.”

Smart advocates know when to dial back unproductive negotiating behavior so as not to risk cratering the process.

#3 Lack of Preparation

I was surprised how many Master Mediators consider inadequate preparation to be a prevalent problem. As one put it, “Unfortunately, poor preparation is not unusual.” Poor preparation annoys mediators because it slows down the mediation process, makes it more difficult to conduct a principled and merit-based discussion about settlement value and limits opportunities to identify creative solutions. In other words, it undermines the core goals of any mediation.

Fully preparing for mediation is a no-brainer. While advocates cannot control all aspects of the mediation process, lawyers (and their clients) can almost always control how much they prepare.

Of course, it's worth exploring what constitutes effective preparation. First, take the time to explain to your client, especially first-timers, how the mediation process works, including the role of the mediator. Doing so will reduce the deep anxiety people feel as they try to resolve high-stakes conflicts that involve money, identity and strong emotions.

Second, ensure that you (and your client) identify and acknowledge the weaknesses in your legal position and the risks and costs of not settling. Lawyers should be ready to address legitimate questions presented by opposing counsel or the mediator. To maintain credibility, they should be equally ready to admit weaknesses in their positions. Too many lawyers overestimate their ability to wing it when pressed to justify how they value their case or how they will address clear litigation risks.

Third, talk with your client about prioritizing their goals. People make better choices when they have time for calm reflection and don't feel pressured to make hard decisions quickly and under pressure. I don't endorse entering mediation with an immovable bottom line mainly because you're bound to learn new information or hear new perspectives—from the other side or from the mediator—that will shift your view of settlement value. Having a clear understanding of a realistic settlement range, however, makes good sense.

To ensure a more principled and more productive mediation session, follow the advice given by Scar in his solo song in "The Lion King": Be Prepared!

In my next post, I will explore several more top mediator concerns, so stay tuned!

Post 6: Annoy the Mediator at Your Own Risk: Negotiation Tactics and Missteps to Avoid, Part 2

In my last post, I explored the top three behaviors that annoy the mediator: (1) being unable to reach a decision-maker, (2) hyper-aggressive advocacy and (3) lack of preparation. In this post, I explore more aggravating, and avoidable, behaviors that may upset or undermine the mediator and the mediation process.

Continuing the countdown of my "Top Ten List of Unhelpful Behaviors" that make the mediation process less enjoyable, less efficient and less productive, this post examines the behaviors ranked 4, 5 and 6.

#4: Viewing the Mediator as a Carrier Pigeon

Perhaps predictably, the Master Mediators don't enjoy being treated solely as carrier pigeons. When lawyers insist the mediator simply bring offers from room to room, announcing them like an emcee at a boxing match, mediators often feel as if their most powerful skills to facilitate resolution have been holstered.

One Master Mediator said, "I hate it, but it's not necessarily problematic."

Nonetheless, this negotiating behavior can become problematic when used with extreme persistence. Lawyers (or their clients) who muzzle mediators—directing them simply to deliver their demands and parrot their legal arguments—often overestimate their own negotiating skills and always underutilize the mediator's skills.

Mediators settle cases more efficiently and effectively when they are given the freedom and flexibility to share their candid assessments of the strengths and weaknesses of each side's legal position. Like a soccer coach who inhibits her players from playing with joy and creativity by constantly screaming directions from the sideline, mediation advocates should avoid micromanaging their mediator. Choose the right neutral and then trust her to run a good process.

And all mediation participants benefit when the mediator can explain the rationale of a negotiating move, particularly when that move disappoints or angers the recipient, which happens a lot. Academic studies show that negotiators appreciate when an offer is explained and justified, leading to more productive responses. Trust in the mediator's communication skills often helps prevent emotional and retaliatory responses that risk derailing progress.

Negotiation can be an emotional process punctuated by strong feelings. As I tell my Columbia Law School students, "People negotiate with people." The value of a mediator extends well beyond his or her ability to relay offers and counteroffers, and includes providing context, explaining an adversary's full perspective, offering creative solutions and objectively assessing the risks and opportunities of litigation.

Since virtual mediations deny mediators the opportunity to use interstitial hallway and water cooler moments for candid conversations, mediation advocates should be more aware than ever of limiting their freedom in other ways.

#5: Taking an Unwarranted Length of Time to Make a Counteroffer

The Master Mediators agreed that advocates who purposely and persistently delay making counteroffers annoy them by making mediations less efficient and, sometimes, less productive. One colleague disagreed, saying, "[T]his happens a lot and doesn't really bother me."

Of course, effective mediation advocates can and should time their offers and counteroffers strategically, managing the expectations of the people across the table. Legitimately concerned that too quick a counteroffer may signal a weak negotiating position or an over-eagerness to settle, advocates may choose intentionally to delay providing a counter until well after they know what it will be.

Sometimes, however, advocates go too far and "weaponize time" by waiting hours before making a counteroffer. Asserting that "we need more time to talk" or "we're still trying to contact a decision-maker"

(see annoyance #1), these advocates try to signal that the other side's offer was ill-considered and unreasonable—even if it's neither—and that their counter is well-considered and hard-fought.

The issue here is one of degree, and effective advocates calibrate the appropriate amount of time to wait before making their counter. Advocates should consider that in virtual mediations, when we usually sit alone in front of our computer, time seems to move in slow motion; one minute can seem like one hour! Taking cues from the mediator, who is shuttling between breakout rooms and gauging the emotional temperatures of each participant, can help.

Waiting too long—and there is no science, just good judgement—can lead to a “vicious retaliatory cycle” by prompting adversaries to respond with the same extreme delay tactics, or other aggressive negotiation tactics. This negative dynamic can quickly spiral, threatening to derail the mediation by inexorably slowing down the process, undermining trust between the parties and triggering strong emotions and allegations of bad faith.

That's exactly why the delay tactic annoys good mediators! Master Mediators encourage an efficient, collaborative and productive dynamic grounded in trust and reciprocity. A persistent use of delayed offers and counteroffers runs directly counter to that goal.

#6: Lawyers Who Prevent Clients From Meaningful Participation

Some lawyers believe that they can negotiate a better deal by sharply limiting their client's participation and “running the show” themselves. These lawyers engage in heavy pre-mediation coaching, advising clients to speak carefully and infrequently, and actively shielding them throughout the mediation.

Of course, skilled mediators can navigate around roadblocks placed between them and principals. As one Master Mediator put it, “If I sense this dynamic developing, I direct questions and comments directly to the client, usually explaining... that I'd like to hear directly from the client.” She continued, “I can't recall a lawyer ever telling his or her client not to respond to my direct questions.”

But the problem becomes more difficult when lawyers demand to meet with the mediator only. If that approach impedes the settlement process, mediators may need to become more assertive. As one Master Mediator said, “I will usually insist on speaking directly with the client, explaining to the lawyer the importance of gaining the client's trust.” To be clear, context matters. Some legal disputes can easily be resolved by working primarily, or even exclusively, with the lawyers. Most mediations, however, benefit from some level of client participation. As one Master Mediator put it, “The dispute belongs to the principals, and they should be able to say whatever they want pretty much whenever they want.”

Rounding out the list are the following unhelpful behaviors: (7) refusing to acknowledge any weaknesses in legal claims or defenses, (8) springing unhelpful surprises at the mediation, (9) making disparaging comments about parties in another room and (10) threatening to end a Zoom session.

For anyone who wants to delve deeper and learn more about mediation strategies and techniques or the fast-changing world of virtual ADR, I regularly provide customized online training sessions and CLE workshops for law firm practice groups and corporate legal departments. Find out more [here](#).

Meet the Master Mediators



**David
Geronemus, Esq.**



**Dina R.
Jansenson, Esq.**



**Shelley Rossoff
Olsen, Esq.**



**Carol A.
Wittenberg**



**Peter H.
Woodin, Esq.**



**Michael D.
Young, Esq.**