

Breaking Bad in Mediation

By Bradley Bostick

Every mediator has to deal with moments when one or more participants to a mediation ends up “breaking bad.” Sometimes this occurs when the plaintiff feels insulted by an initial low offer. Sometimes it is when the plaintiff feels that they are being attacked or put “on trial”; for example a plaintiff hit in a crosswalk who feels like she is being blamed for not paying more attention. Or a plaintiff gets angry because he believes he is being intimidated or not respected because of race or gender. Some plaintiffs come to believe that the mediator is working for the defense or they adopt a “kill the messenger” attitude when the mediator tries to present the defendant's position. A plaintiff may get increasingly upset when it becomes clear that the insurer is never going to pay what the plaintiff had hoped for. Sometimes a plaintiff would rather go to trial just to punish the defendant even where liability is admitted and good money has been offered.

In situations where the defendant is part of the mediation process, for example in a landlord tenant case, the defendant can break bad by making irrational demands, or insisting that little or no money be paid even when an insurance company is putting up the money.

Sometimes an attorney will break bad by becoming overly defensive or aggressive in a joint session (or a truncated joint session) leading to a more rather than less polarized situation.

Sometimes the claim representative will break bad by taking something personally when the plaintiff's attorney advocates a little too zealously. Or the out of state supervisor breaks bad by refusing to consider a reasoned request for additional authority based on changed circumstances presented during the mediation.

And yes, sometimes even the mediator can break bad. Worn down by perceived intransigence on one side, a mediator may lose their cool in an uncontrolled way. One mediator was reported to have said to a plaintiff's attorney who wasn't willing to move in response to an offer, “are you drawing an f ing line in the sand.”

Fortunately, except in situations where the mediator is the one who needs to be talked down, there is almost always a way to work with or work around the moments in a mediation where someone breaks bad and threatens to derail the process.

Next time, I will discuss how a good mediator can work through the challenges of one or more participants breaking bad.