

## **“Pet Peeves About Mediators No. 5: Failure of Creativity”**

In this series of articles discussing mediation “pet peeves” revealed by post-mediation discussions with attorneys, we’ve already covered: (1) lack of preparation; (2) lack of engagement; (3) being a “number carrier;” and (4) adjusting parties’ expectations about mediators. This article speaks to failing to produce creative solutions or strategies when things are stymied and difficult.

Of participants who responded to inquiries about pet peeves, just two said failure to come up with creative solutions was a “pet peeve.” I conclude, then, from the number of responses this “pet peeve” is less damning than being thought to be unprepared or being thought to be less than even-handed in mediation. In reflecting on attorneys’ comments, it occurred to me that “failure to be creative” may simply be a different way of describing a mediator who is a “number carrier.” But, putting that last thought aside, can we be “creative?”

### **Leading Parties Outside And Away From “The Box”**

I have come gradually and over time to examine pre-mediation statements from a detective’s point of view. I even look for clues in typography. I scour pre-mediation submissions for bold type and italics

and sentences ending with exclamation points. I do so because typography often identifies sources of outrage and emotion. A separate, subsequent reading of a pre-mediation statement fastens on omissions: What facts are not dealt with? Is the sequence of events ignored? Are certain damage elements soft-pedaled? Does the pre-mediation statement contain items marked confidential?

I have found that omissions, unusual emphasis, and identified confidences may provide a mental spark for the mediator. Following these clues -- with some success -- has led me to examine pre-mediation statements using different filters: What is emphasized? What is omitted? What does a party not want to reveal in mediation to the other side? These gleanings from pre-mediation submissions may be clues to be pursued in pressing a party to expand in conversations on just those points.

### **Why Are You Doing That?**

A concealed creative solution may be uncovered by making parties explain a settlement offer in as exacting and excruciating detail as can be demanded or extracted. Engaging a party in analyzing an offer of settlement certainly will expose points which are essential or especially sensitive. The process may let slip points which simply are make weight.

Encouraging and requiring a party to articulate reasons for a demand or for an offer enables the mediator to provoke reconsideration of a previous position. Does an explanation raise other possibilities? Creative solutions can be sourced in the parties themselves by directing the parties' attention to their explanations, and sometimes mediators can bring on a brainstorm by drawing out details.

Parties often wish to “send a message” with a particular offer or demand without being either blunt or terribly clear about what the message is. When an offer or demand appears to me to result from a desire to send a more or less coded message, I always ask the party (or attorney) to explain. I think to myself that this is a “Dr. Phil Moment.” (Dr. Phil on his television program often asks the question, “How is that working for you?”) Mediators can offer advice, provide guidance, recite experience from previous cases, claims or circumstances, offer a snapshot picture of the status of negotiations, and try to expand the range of choices available in arriving at a solution. All these efforts and techniques are simply means of asking parties to list alternative choices for responding and asking parties to consider how the response will be received by the other party. These efforts expose whether a particular party is a competitive, hardball player or

perhaps a player with a collaborative thought and a previously unexpressed focus on a bigger picture.

There is no single way to mediate. Good mediators – those considered by parties to be creative -- are prepared to do whatever will work with the particular participants at that particular time. The mediator's problem is that mediations never unfold quite the same way twice, and creativity may rest merely in dismantling complex issues into smaller parts which can then be incrementally resolved.

The best means of avoiding leaving an impression of a creative deficit is to turn the tables of on the parties by pressing them to discussions which may disclose alternatives to the mediator or to the parties themselves.

Ask. Draw out. Be nimble in adjusting to what you have heard. Creativity may lie in listening closely, but drawing out the parties so you have something to listen to is the hard part.