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In Mediation, Let Your Creative Spark Light up the Process

Lawyers do not always think of their work in terms of creativity. Although quite a few lawyers are playing in the Chicago Bar Association symphony orchestra, singing and dancing at Chicago's beloved "Christmas Sprits" show, painting, drawing and secretly writing everything from screenplays to poetry in their free time, many mourn the loss of creativity in their daily work lives.

Unless a case gets far enough along to allow for writing a closing argument, it can feel like creativity has been left behind at the doors to law school.

One of the nicest things about the increasing use of mediation in legal disputes is that it allows for and rewards creativity. This does not mean being creative to the point of misrepresenting the facts of a case to the other side or the mediator — clearly a breach of professional ethics — but rather, that there is an enormous opportunity to be creative in the mediation process.

The mediation opening presentation is a wonderful opportunity to use your creativity. As mediation is really just a negotiation with a third-party facilitator, the mediation opening presentation should be used to engage the decision-maker on the other side. Unlike the opening statement at trial that is subject to strict rules about sticking to what the evidence will show (which too many lawyers still seem to think is the appropriate way to begin a mediation), the opening presentation in mediation can be anything at all.

There are typically no rules about what can be said in an opening presentation other than perhaps ground rules agreed to at the beginning of the mediation session such as speaking one at a time and treating each other respectfully.

So why not create something truly compelling?

Mediations can begin with videos, PowerPoint presentations, apologies, offers to listen, non-monetary ideas for resolution, an explanation of your client's back-

ground and values, damages charts or anything else you can dream up.

Whatever you create, be sure to acknowledge the other side in a meaningful way and be clear that you are flexible and open to re-assessing your position if there is new information that comes out at mediation. This step is critical because the chances of your angry counterpart actually taking in your message — the reasons why there is uncertainty for them in going to trial — will go up exponentially.

If your extremely clever presentation is just a fancy way of telling the other side why they are wrong and nothing more, you may as well save your creative energy for your novel.

Possible ideas for resolution that do not necessarily involve money are also fertile ground for creativity in negotiation and mediation.

Examples of such settlement terms might include donations to charity, community service, memorials, creative payment plans, letters of recommendation, training programs, new standards, agreements to monitor, loans, restructurings, revised contracts, communication plans, tolling agreements, reviews of books and records, trusts, insurance policies,

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changes of role such as executor, officer or director, licenses, auctions and agreed communications to third parties or on social media.

Durable creative solutions are generally hit upon through the process of the mediator asking many questions to identify each party's interests behind its position.

There is also good news for lawyers who do not feel so much

BEYOND DISPUTE



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that they are constantly stifling their creativity, but rather that they are not creative types or perhaps that any creativity they once had has atrophied.

Creativity can be learned. This is just another area where scientists studying neuroplasticity are showing we can change our brains.

There are a number of concrete ways to increase the ability to generate creative ideas. One way to increase creativity is to take an improvisation class.

As local improvisation experts Kelly Leonard and Tom Yorton describe in their extremely helpful

skill." They note that the qualities of an improviser mirror the qualities that Google looks for in hiring, such as the "ability to process on the fly," a "willingness to relinquish power" and "ease with creating space for others to contribute."

Effective lawyers negotiating in mediation also share these traits.

Improv training can also help with brainstorming skills, a process too often overlooked in preparing for mediation. Improv training is grounded in ensemble work where refraining from judgment until all the ideas are on the board is paramount. In the words of Winston Churchill, "No idea is so outlandish that it should not be considered with a searching but at the same time steady eye."

Lawyers and clients should start discussing creative non-monetary solutions weeks before a mediation session and a first-rate lawyer will begin the process the day the case comes in the door as she or he assesses the most appropriate dispute resolution process for the problem at hand. Starting early also gives your unconscious mind time to work on ideas.

Another process for increasing creativity in problem-solving and decision-making is a mind map. A mind map is an electronic or large paper drawing on which you and your team create an image of concerns, interests and ideas. The main idea or problem is placed in the center and branches are drawn radiating out.

Mind maps help us make implicit ideas explicit and assist us in coming up with new ideas. A mind map can also become an excellent visual to use in a mediation opening presentation. Dave Maxfield and Richard Serpe provide an overview of available software with examples of mind maps in a trial preparation context in their article "Becoming a Mind-Mapping Jedi," *Law Practice Today* (February 2012).

The more you practice your new skills, the better you will be, and the more you will enjoy the creative side of being a lawyer.