

Professional Perspective

Creativity in Mediation Is Key

Contributed by David Zacks, JAMS

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Albert Einstein once said, “Logic will get you from A to B. Imagination will take you everywhere.” Have you ever found yourself just going through the motions in mediation: caucus, shuttle offers back and forth, and repeat as necessary?

Every case is different. Your clients’ personalities differ with each case. How often are you adjusting your game plan accordingly? Use some creativity and imagination in the dispute resolution process, particularly in mediation. That map that you have in your mind that you think will lead you to settlement—throw the map in the trash.

Do not think outside the box; there is no box. Here are a few real-life examples of unconventional ways to achieve the desired outcome in mediation: a fair resolution.

Take a Walk or Have Virtual Coffee

As more people are vaccinated and in-person activities resume, call your mediator and suggest taking a walk (socially distanced, of course). Why? A change of scenery will unclutter your mind and help you build rapport.

If a walk together is not feasible because of distance or safety concerns as we all continue to be cautious and vigilant with Covid-19, have virtual coffee with the mediator. When the mediator reaches out for the pre-session call, let the mediator know that you would like to have a virtual coffee break via video. Similar to taking a walk, changing the setting will allow you to build rapport and give the mediator insight into your case. Videoconferencing, much like Einstein said about our imagination, can take us anywhere.

As you would in a traditional pre-session phone call, use this time to tell the mediator about the personalities involved in the case. This will provide a perspective that is just as important as the facts. So often, counsel for both sides are just so close to the facts and the law that they forget people are involved. Help the mediator understand the people.

Get an Expert for the Mediator

In many cases, each side enlists an expert to try to tell the other side the value of its case. Each side also wants the mediator to think that it has the better argument. For example, in health-care disputes, pricing transparency is one of the most important variables affecting contracts between health-care providers and payors, and accountants are often involved in those cases. Other examples include the value of ancillary medical services between health-care providers and insurers or an executive's future earning capacity after a catastrophic injury.

What if you went to your opposing counsel and suggested providing the mediator with a neutral expert of their own choosing? Sure, there is an added expense, but the value of the mediator understanding the economics could be invaluable in reaching the fair resolution you desire. This may remove posturing from the equation, potentially saving significant time in the mediation.

Think how powerful your suggestion would be to opposing counsel, even if it's not accepted. It shows you believe in your case and want to ensure that the mediator is armed with the technical information the mediator may desire in moving forward toward an optimum result.

Turn the Tables

In private sessions between the mediator and attorneys, an impediment to settlement is the zeal of counsel. Counsel may not be able to see the forest for the trees. As an advocate, if you recognize that opposing counsel is creating an impediment to settlement, have the courage to suggest the mediator meet with the party representatives outside the presence of their lawyers.

Turning the tables in this way might be the creative injection that the case needs to move past impasse. It is a gutsy move, and requires significant trust in the mediator, but it can successfully lead to a fair resolution.

Employ Demonstrative Evidence

Consider the value of demonstrative evidence in a mediation. Suggest to the mediator that you plan to demonstrate your case in the mediator's presence, because you feel it would be of great value in reaching settlement that day. What does this mean? Consider a suit involving an allegation that a telehealth visit failed to identify a medical issue that resulted in patient harm. You could set up a mock telehealth visit onscreen to show the mediator what both the physician and the patient would have experienced. You would have the clarity of the visuals, complemented by the dialogue between the two.

Another example is demonstrating physical disability following a catastrophic injury by showing a video of the orthopedic surgeon working with the patient. The attorneys could show the doctor, in real time, showing the patient's range of motion and describing the limitations. This firsthand account brings the issue to life, is incontrovertible, and enhances credibility with the other side and the neutral.

Suggest Dual Mediators

Two heads are usually better than one. It may be worth suggesting to the other side that two mediators should be engaged to resolve the dispute. It is often frustrating when the mediator is spending an hour with one party, while the other side waits. Two mediators means less down time. Both could be in a caucus privately, and then put their heads together and continue. For example, in a complex business dispute that involves nuanced insurance questions, it may help to have one mediator focused on the business issues and another tackling the insurance aspects. Mediators with different backgrounds can come together and provide a well-rounded perspective.

In high-value, high-stakes cases (where the clients are able to bear the cost), this approach is worth considering. The outcome may be well worth the cost.

Conclusion

There is little reason to do it the way you have always done it. Mediation is a process in which the parties have an opportunity to choose their fate. So why not think creatively and try the unconventional?

Sometimes the maps we lay out to get to where we want to go limit us instead of guide us. So, go off the beaten path and move toward your goal using your creativity in assisting the mediator as well as opposing counsel to the end game: a fair resolution.