



Embrace Failure: Get A Good Result in Mediation

By David M. Zacks, Esq.

Instead of going into a mediation like it's "déjà vu," try to think about it as "vuja de." In other words, it won't be the same as it has been before.

It was dark as I took my early morning walk with my dog, Red, while listening to a TED Talk. As I entered Piedmont Park, it occurred to me how beautiful the sky becomes at the moment between darkness and sunrise. Then there is a sudden change, the beautiful pinks go away and the bright blue sky appears just as the sun rises. The morning's own "ah ha" moment. I had my own "ah ha" moment as I was watching the day begin. The speaker I was listening to was Adam Grant, and he talked about some of the surprising habits of original thinkers and the concept of "déjà vu" and "vuja de," looking at things differently than it has been before. He also talked about the importance of failure. As I listened to him share his thoughts, it resonated with me how powerful his message could be in the context of two sides trying to come up with a resolution in a process we call mediation. When I serve as a mediator, I so often see lawyers approaching the process as if it is déjà vu. I think a fair definition of this would be the "experience of thinking that a new situation had occurred before." In other words, we go in putting offers and counteroffers on the table in hopes that a neutral like myself might bring

the parties to consensus with questions and ideas that might disclose the strength and vulnerabilities of both positions.

Often before a mediation, the parties tell me that they feel the process will be a waste of time because the other side is so unreasonable. Whenever I hear such a refrain, I try to point out that this is usually the reason why mediation is indicated. If the two sides were already close, then they would probably be able to settle the case on their own. It is precisely because they are so polarized that they need the intervention of a mediator. This is all well and good, but I would like us to consider instead of going into a mediation like it's "déjà vu," to think about it as Adam Grant suggested and make it "vuja de." In other words, it won't be the same as it has been before. "Vuja de" would be a process in which counsel and the mediator would be exploring how they could make the process better and different. As you create this "vuja de" moment, you might explore things that are not only outside the box, but also outside your comfort zone.

A relevant example might be a case in which I had two brothers who were so angry at each other they would not allow an opening session because they didn't want to be in the same room. Not only had they not spoken for 10 years, they did not allow their children to speak or see one another. We settled the financial matters but I struggled with how we

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could do something to improve the family dynamics even though it had little or nothing to do with mediation. I got permission from both lawyers to take the brothers for a walk. As I stood between them, the topic we discussed was trying to find a common ground that they could each give a small portion of the settlement proceeds they had agreed upon to a charity that meant something to both of them. Yes, it was a beginning and I continue to follow through with these brothers to make sure the beginning has a middle point and hopefully an end point of reconciliation between them.

I recall almost reaching an impasse among a large group of medical professionals in which the younger members of the group felt the old guys were keeping far too many dollars in this successful practice. The old guys felt they founded the firm; it had a great reputation; and they were entitled to the majority of the income. They both referred to the other as “SOBs.” Since I was gaining no momentum, I suggested that we all get around a table the following week. I opened the session by congratulating them and letting them know we had reached an accord. They looked at me as if I were crazy (maybe I am). The agreement was they all felt the other side was filled with SOBs. I said that if we can agree on this, it seems like we can agree on the money and be done with this. It broke the ice, they laughed. Take away point—it’s much easier to reach an accommodation with people smiling than having a lot of grumpy people on both sides. Never underestimate the value of humor.

If you embrace this concept of “vujà de” and not “déjà vu,” you have to embrace some failure with

it. As Grant describes, “The greatest originals are the ones who fail the most, because they are the ones who try the most. You need a lot of bad ideas in order to get a few good ones.” I encourage us to embrace failure and not run from it. We should strive to be creative to avoid ending up striking a jury and rolling the dice.

As an example, I was representing a plaintiff in a personal injury case, and we received an outstanding verdict and award from the jury. While on the elevator in the Richmond County Courthouse, I asked the jury foreperson what was the most important factor in the jury’s decision. She replied, “... your partner sitting at the table has curly hair like my son, and I just knew everything you said must have been the truth.” Talk about rolling the dice!

It was Abraham Lincoln who said, “A good settlement is better than a good lawsuit.” Fortunately, the vast majority of civil cases are settled which proves that his admonition has been taken to heart. The widespread acceptance of mediation in my view shows that it is a highly effective form of dispute resolution.

Let’s embrace failure as we come up with an idea that can bring consensus and resolution. Here’s to failure until you hit that great idea. Here’s to “vujà de” and not just “déjà vu.”

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