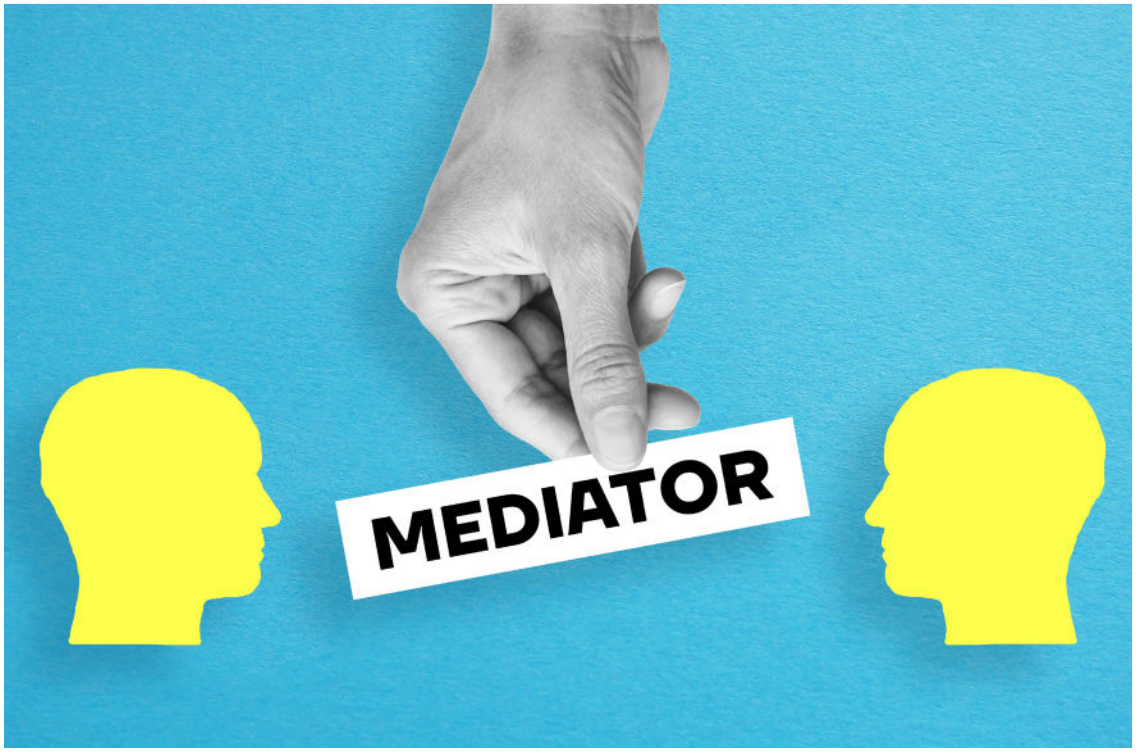
LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
TUESDAY, AUGUST 13, 2024

PERSPECTIVE

Hitting the target no one else can see

By Greg Derin



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I recently came across a blog post entitled "Imagination vs. Creativity," by Venkatesh Rao, the founder and editor of a site called Ribbonfarm. Mr. Rao's thesis was his proposition that imagination and creativity are different skills situated along a common spectrum in simple cases, but not connected in more complex matters. Without attribution, Rao cited a favorite reference, the philosopher Arthur Schopenhauer observed that "[t]alent hits a target no one else can hit; genius hits a target no one else can see."

In the vast majority of commercial mediations, parties, counsel and mediators content themselves to discuss liability issues to determine the parameters of the substantive negotiation and expend the majority of their effort on purely distributive bargaining, typically over money. For every dollar demanded and ultimately conceded, dollars must be offered. That "dance" is repetitive and universally acknowledged to be frustrating.

Sophisticated mediators bypass parts of the dance, but techniques to shortcut distributive bargaining is not per se the subject of this article. This discussion concerns creative alternatives which can avoid purely distributive bargaining. In most of the cases where I serve as a mediator, the negotiation involves multiple elements and rights. A distributive bargain involving money can be one such element. With sufficient creativity and imagination, the parties have the opportunity to envision ways to satisfy their interests, avoid a singular painful dance for dollars, and substantially impact the financial negotiation.

How often do counsel tell their clients that a good settlement is one in which everyone walks away unhappy? Do they actually believe that? I know no good mediator does. A mediator's goal is to push the parties – drag them, if necessary – to share what is really important to them and explore every potential "asset" that might be utilized in the negotiation. Is it money? Is the issue security, time to pay, to construct something, to develop/exhibit intellectual property? Is it naming rights, a charitable contribution, medical insurance, travel miles? Is it an apology, a credit, an acknowledgment?

There are endless opportunities. Understanding the options can be the challenge. The goal is always to permit the parties the greatest possibility to determine if they can negotiate a better result than can be achieved if there is no negotiated resolution (e.g., litigation, foreclosure). Theoretically, any result that makes one party better off without making the other worse off is a good result. But optimally, the objective is to create more value so that all those engaged in the conflict can see themselves as better off as a result of the negotiated resolution.

Thinking creatively or imaginatively requires "lateral thinking." That is, the willingness to brainstorm to solve a problem and generate ideas without the constraints of traditional logic bound analysis. The parties and counsel must be willing to answer "why" questions; to dissect their interests and answer tough questions. They must be willing to begin at the end – to imagine their conflict resolved and envision an optimal solution. From that vision, what alternatives might be available to achieve the result? It is not easy; both individuals and cor-

porate representatives resist being pushed to answer these questions and imagine such a future. But reframing the problem and exploring solutions in this manner can lead to extraordinary win-win results, cost less than continued or threatened litigation, and repair frayed relationships.

How can counsel and parties develop and apply lateral thinking?

Ask why? Why are you doing something or taking a position in a negotiation or litigation? Does it really matter if you get paid or pay a demanded or offered amount by a specified date? Honestly assessing the "why" forces parties to deconstruct and analyze their assumptions and conduct. The result is a fresh examination of obstacles and a flourishing of ideas and potential options.

What differences exist between the parties? As Robert Mnookin, Scott Peppet and Andrew Tulumello proposed in *Beyond Winning, Negotiating to Create Value in Deals and Disputes*, examining the differences between parties may be more illuminating than seeking common ground. Such an examination may uncover potential trades by exploring the different resources, relative valuations, forecasts, risk preferences and time preferences of the parties. By understanding the priorities and values placed on these preferences by the parties, trades become evident.

Explore economies of scale and scope. Mnookin, Peppet and Tulumello also note the potential for joint ventures that arise when the parties openly share information, revealing common interests where value may be created without competition. For example, the possibility of joint manufacturing runs, joint purchasing of goods to lower costs, or sharing or dividing territories.

Identify interests. Mediators say this all the time. They probe what really matters to the parties and ask them to identify what they believe matters to their bargaining partner. Simplistic answers will come first and may become more detailed or revelatory with probing. Exploring and admitting interests with honesty is key to assessing whether potential options are better than the alternatives. Just saying more (or less) money is never an honest answer. Money is a commodity, so are benefits, annuities, travel miles, tax deferred payments.

Expand your analytical team. No matter how many times I read an article that I write, I later find errors. The same was true when I wrote briefs. Analysis falters more fundamentally than syntax and risks greater oversights and limitation of one's thinking. There is an old Yiddish expression, "[t]o a worm in horseradish, the world looks like horseradish." The longer parties and their counsel live within a conflict, the more they become convinced of their position and the less likely they are to see vulnerabilities and alternative paths to resolution. As you enter a negotiation, expand your team; fresh eyes bring fresh perspectives. It may be "settlement counsel," it may be a business manager or accountant, it may be a family member or a mock jury. This is especially important if the potential "problem" is in the negotiating room – that is, the person whose judgment or action was integral to the creation of the dispute and who may feel compelled to justify their behavior.

Simplify. Mediators often reframe issues and language. They do this to avoid inappropriate distraction and confrontation. Reframing often simplifies the issues and creates a focus on important underlying issue(s). Be attentive and open to examination of new formulations of the issues; doing so may allow parties and counsel to appreciate the conflict in previously elusive ways.

Mark Twain wrote that "[y]ou can't depend on your eyes when your imagination is out of focus." Believe in your creativity and imagination, do not fear brainstorming, and let a skilled mediator help you along the path.

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