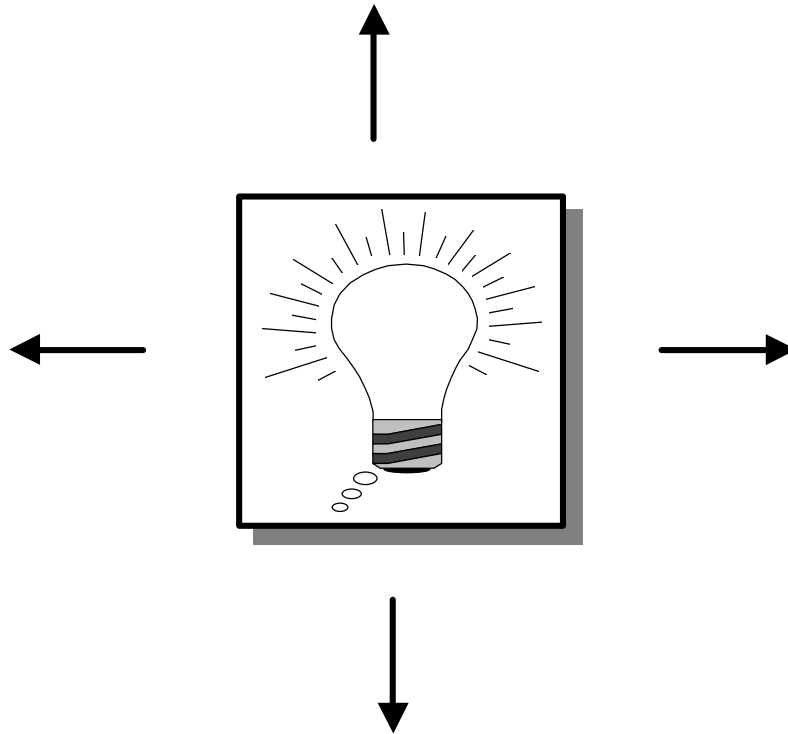


CREATIVE RESOLUTIONS IN MEDIATION —

THINKING OUTSIDE THE BOX



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Most disputes submitted to mediation are resolved. In fact, statistics indicate that approximately 80% of disputes will settle as a result of the mediation process.¹ However, some disputes are tougher to resolve than others.

Typical causes making disputes more difficult to settle are that the wrong persons are at the table; or, perhaps, the wrong mediator was chosen. Sometimes, the dispute cannot be settled because pertinent facts are unknown. It may be that the parties' experts are at loggerheads. Frequently, mis-communication among the parties is a barrier to resolution. The parties may be in agreement as to who is the responsible party and what the solution should be; however, the responsible party cannot afford the solution. And, let's face it; there are some disputes that for some, all, or none, of the above factors, simply will not settle, i.e. the "tough nuts."

The purpose of this paper is to identify typical reasons why mediation may not resolve disputes, and to suggest possible, perhaps even creative, ways of dealing with the more demanding disputes.

1. When The Wrong Persons Are At The Table

If the wrong persons cannot settle the dispute, who are the right persons?

Two categories of individuals are critical for resolving disputes through mediation: (a) those who know the facts; and (b) the ultimate decision makers. Having one category of persons without the other is totally unsatisfactory. If the "fact persons" participate exclusively, they will likely rehash the same old issues, and little or no progress will be made. Even if the "fact persons" can agree on a solution, they must work to bring the remote "decision makers" up to speed, usually by recounting the tortured progress of the negotiations, their impressions

¹Roth, Wulff and Cooper, *The Alternative Dispute Resolution Practice Guide*, Sect. 24:8 (Lawyers Co-Op publishing Company, 1993).

of the other side's case, and their reconstituted positions, typically over the telephone to a busy decision maker who wants a "down and dirty" summary.

Conversely, if the "decision makers" alone are present, they will not typically have sufficient knowledge of the facts and law giving rise to the issues to adequately negotiate or compromise them in the best interest of the party. Of course, if the "decision makers" are prepared to cut the dispute with a machete, instead of a scalpel, there is usually no need for a mediation.

Therefore, the best combination of persons, on each side of the dispute, are, on the one hand, the individuals who know the issues, those who lived, breathed and can best convey the passion and the heat of the story; and, together with the "fact persons," the ultimate "decision makers," who need to hear, first hand, perhaps for the first time, the story as told by both sides.

2. When Pertinent Facts Are Unknown

Sometimes, the issues are difficult to resolve because facts are in dispute that are presently unknown, but which can be relatively easily determined. For example, is liability or property insurance available to indemnify the aggrieved party? What is the current cost of repairing or restoring the damage? Just how long are the court dockets in the jurisdiction where the case will be tried, if it cannot be resolved by negotiation or mediation? Examples abound where pieces of the puzzle are missing from the table. And, it is almost a truism that the more facts of the dispute that can be known, the more likely the solution will come into focus.

Therefore, if and to the extent that facts, conditions or circumstances are unknown, the remedy may be to pause, or to proceed with other issues in the mediation while the missing facts can be found. This endeavor may involve telephone calls, personal witness statements, site inspections, appraisals, document retrieval, research, analysis, or a myriad of other techniques to learn pertinent facts or reconstruct the history of the dispute.

If a particular individual has relevant knowledge of the issues, there is no reason why that person cannot be called to the mediation to present the information - not necessarily sworn testimony, but rather a narrative recounting of the facts which can then be submitted to questions or discussions. Of course, this approach raises the classic dilemma in all negotiations or mediations, i.e., should the party play all of its best cards at the mediation table? Once in a great while, there are unusual circumstances when the ace should be left "in the hole" for trial. However, in the vast majority of cases, the more facts that are known to all parties, the sooner the

case will settle, the less litigation cost and time will be expended, and the happier the client will be with its counsel.

3. When The Experts Are At Loggerheads

All lawyers are familiar with cases which reduce to a “battle of the experts,” *e.g.*, one who testifies that the sun sets in the west; and another who is prepared to swear that he saw an eastern sunset. Or, perhaps, the positions of the experts are not diametrically opposed, but differ only in perspective; *i.e.*, the sun rises in the west and sets in the east, as one views the sun from the Sea of Tranquility on the moon. In either case, there is a possible solution.

There is no impediment to a mediator’s requesting that a totally independent expert be retained or brought into the mediation process as a neutral expert, to assist both the mediator and the parties in either resolving or sufficiently clarifying the positions of the experts, so that the entire dispute can more easily be resolved. One approach would be for the neutral expert to submit a confidential written report to each party; or, if the parties agree, have the neutral expert openly discuss the issues with the parties, either together or in caucus; or the neutral expert can confidentially advise the mediator, so that the mediator can better understand the conflicting positions taken by the experts.

The point is that mediation can be infinitely flexible, depending on the willingness of the parties and the mediator to fathom the depths of the dispute. Sometimes, the perspective of a totally neutral expert can help.

4. When The Parties Cannot Communicate

Most disputes develop, not because people lie, cheat or steal; but rather because they fail to communicate; or, because they have arrived at an issue from different perspectives or biases; or, because their interests are vitally at odds. This being the case, disputes can more readily be resolved, even creatively, by connecting or reconnecting the circuits of communication.

The starting point of better communication is to state, or restate, the positions of the parties so that each party clearly understands and appreciates both its own and the other side’s position in the case at hand. Usually neither side, when its position is truly understood, is taking a totally unreasonable or unjustified position. Therefore, if and when the positions can be clearly understood as possible, the more likely a resolution.

Often, an issue can be reframed. For example, if the issue as stated is whether the building was constructed according to the design specifications, perhaps the issue could be reframed, whether the structure, as built, or as slightly modified, can be equally or better suited to the customer's needs. Or, if the dispute is whether the incinerator should be built in the backyard of the plaintiff, the question could be restated as whether the project can be modified, or whether a compensating benefit can be bestowed upon the plaintiff, short of a permanent injunction or payment of consequential damages.

Most people like to brainstorm, particularly with regard to technical solutions. Therefore, if the issue in dispute can be shifted into the technical mode, the greater the likelihood of a creative resolution. For example, if the hotel cannot be lighted as designed with laser beams, is there another way to illumine the hotel so that its image can be enhanced, perhaps even more effectively, and at less cost?

A good way to start the creative resolution juices flowing is for the mediator or the parties to posit hypothetical questions. For example, what if we reconstructed the deal in this fashion, etc.? Even if no solution immediately appears, at least other lines of communication can be explored.

Another way of reconstructing the dispute, particularly where the parties are miles apart, is to, hypothetically, suggest that both sides drop consequential or "soft claims" and talk only about their out-of-pocket or "hard costs." In most instances, the "soft costs" are never recovered or are negotiated away before trial. Therefore, the sooner these "softer" issues can be resolved, even hypothetically, the more likely the entire dispute can be settled.

The use of co-mediators can be considered. The role of a single mediator is difficult, at best. It is extremely difficult for one person to accurately hear, filter, understand, and appreciate the many conflicting positions of the parties. Also, the creativity of one individual is limited. Having more than one mediator, particularly in more complex disputes, with multiple parties, can lead to quicker, more creative resolutions.

5. When There Is Not Enough Money

It sometimes happens that parties can agree on fault, liability, and the obligation to pay; however, what if the obliged party simply cannot afford to pay? Even in these instances, there is room for creativity.

The structured settlement, often used in personal injury cases, is an obvious example of extended payments reinforced by interest. Structured or extended payments can also have tax advantages for the payee. It could be that the paying party needs more time to increase revenues. If lump sum payments are more painful, and, therefore, more difficult to deliver, an extended payment plan may be a viable alternative.

Payments can, also, be made in kind, either goods, services or both. The party liable is usually in the business of providing goods or services; it already has the processes of delivery in place, and prefers to keep its employees and resources occupied. Therefore, payment by product can be more palatable and, therefore, easier to agree upon.

The possibilities of finding available insurance proceeds should always be explored. Liability and property insurance policies cover a myriad of losses and claims, and the best solution may be to shift the loss to a third party insurer. Obviously, potential subrogation rights have to be considered, as well as policy notice requirements, time limits, exclusions, exposure to additional premiums, and periods of limitations. Nevertheless, insurance can be a possible alternative or supplement to direct payment.

If payment of money is difficult or impossible, the plaintiff should consider taking an assignment of the defendant's claims. The paying party could have a viable claim against one or more third parties that could be readily and willingly assigned to the plaintiff. There are many possible alternatives to the raw and often painful payment of large sums of cash as the only resolution to a dispute. For example, consider future options to purchase or sell, mutual and cooperative advertising or publicity campaigns, indemnification or hold harmless agreements, covenants not to sue, and many other exotic legal remedies that are the subject of law school courses. Here, again, the creative and facile minds of counsel and the parties can be exercised to their limits toward resolving a truly tough dispute.

6. When The Parties Still Cannot Agree

Sometimes, even with the most creative minds at work, the dispute simply will not settle. Even in these "toughest of the tough" cases, progress can still be made.

If the entire dispute cannot be resolved, maybe it can be broken into its component parts, and portions of the dispute resolved by mediation. The fewer issues left for trial, the quicker and less expensive the trial will be.

Another possible log-jam breaker is to convert the mediation into an arbitration, i.e., “med-arb,” where the mediator is authorized by the parties to issue a binding award or determination concerning the issues. There are many considerations, pro and con, in deciding whether to convert the mediator into an arbitrator; however, the option is available. A variation on the “med-arb” process is for the parties to agree that each will submit, in writing, their last and best offer, and that the mediator will select, in baseball arbitration fashion, one or the other of the last offers. This modified mediation-arbitration process has been characterized as MEDALOA, i.e., “Mediation And Last Offer Arbitration,” a variation of the baseball arbitration process. The objective, of course, is to encourage the parties to come as close as possible in their settlement offers, so as to avoid taking an extreme and unpersuasive position.

If the dispute cannot be totally resolved, it may be that the parties can agree upon the payment of attorney’s fees and litigation costs to the prevailing party if the case must be tried. An obvious question is how to determine the “prevailing party;” and a possible formula is to tie the liability for attorney’s fees and litigation costs to the ratio of the amount claimed to the amount ultimately recovered. Again, the potential exposure for litigation costs causes the parties to seriously re-think their desire and willingness to try the issues.

Another alternative to a total resolution is to agree on a discovery plan or trial schedule, perhaps with a more limited set of issues. It is also conceivable that the parties can agree to try some issues without a jury.

Even if the case continues to a trial, the mediation can continue as a “shadow mediation.” Following this approach, the parties can continue to negotiate, with the assistance of a mediator, as the case proceeds through the trial stage. Because the trial lawyers will likely be totally consumed in the trial preparation and presentation, the “decision makers” can continue the dialogue, together with the mediator, in the ongoing “shadow mediation.”

In summary, creativity has virtually no limits in the context of mediation. The possibilities are limited only by the capacity and willingness of counsel and the parties to think creatively. Remember to think outside the box.