

Kluwer Mediation Blog

Brainstorming

Alan Limbury (Strategic Resolution) · Tuesday, October 22nd, 2019



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Although my mediation training made no mention of it, 32 years of mediating have taught me that mediations generally unfold over two stages:

Stage 1: “Who Did What to Whom”?

Here parties (or their lawyers) follow the ritual of naming, blaming and claiming – recounting facts, providing evidence and legal standards and making demands. While the language and narrative may differ from mediation to mediation, the core content rarely strays from this.

Stage 2: “What’s It Going to Take to Fix It”?

This is the place where mediation magic can begin to operate and, finally, generate possible solutions for a good outcome.

Stage 1 can move excruciatingly slowly. My mediator’s mind has often begun to see a glimmer of hope quite early in this stage. I regularly feel impatience and frustration. This tempts me to encourage the parties to fast-forward to stage two before they become exhausted and dig into the dispute so deeply it seems they can never reach a good outcome. This is a trap and I have learned from long experience to bide my time and let the parties do what they need to do before they are ready to consider

resolution.

I have learned that venting matters to the parties - although I often observe that it makes their lawyers nervous and instinctively try to shut it down. I encourage the lawyers to let the venting play out as something their clients need to get out of their system before they can start to move on. Paying attention to the venting can often uncover cues about the parties' previously unidentified underlying interests, which can signal opportunities for exploration during the second stage.

Brainstorming - mining interests to fuel creativity

In conflict resolution the answer is always in the interests and identifying these is the reward for the mediator's patience in Stage 1. Once uncovered they provide an opportunity for creativity via an agreed joint session to brainstorm possible options for agreement. It can be challenging for even the most experienced mediator to persuade parties and their lawyers to embrace this kind of creativity. Lawyers often prefer to move directly to offer and counter-offer and are deeply suspicious that brainstorming may be a seductive way of inducing their clients to give up their entitlements. Again, the mediator's persistence can be very helpful in ensuring that parties explore opportunities to make the pie bigger and do not exit the mediation leaving unexplored value on the table.

Getting the best out of brainstorming - structure matters

Because brainstorming is often not well-understood or familiar to all participants it is important for the mediator to support its integrity by explaining and obtaining commitment to the two rules of brainstorming.

Rule 1: Separate inventing from deciding:

Fisher & Ury, (*Getting to Yes, Negotiating Agreement Without Giving In*) emphasised the significance of this rule. It requires that during the brainstorming session no-one is to be taken to be making an offer. This liberates parties to suggest all sorts of possibilities, without being taken to have made a commitment. They can decide later whether any of the options generated are acceptable. Mediators can help by politely calling out language inconsistent with this rule, such as "would you be amenable to...?" and "we would be prepared to...".

Rule 2: Avoid both criticism and praise while ideas are being generated.

"Premature evaluation inhibits creativity" - this is the warning from the authors of *Beyond Winning* who provided ongoing development of Fisher and Ury's work. It means that if I come up with an idea and somebody snorts in derision (as usually happens when it's my idea!), the message goes around the room: "only good ideas please". Somebody who was about to suggest an idea may refrain from doing so, to avoid derision and criticism. It is often the crazy idea that clearly could never work that prompts somebody to come up with an idea that all later accept, and which nobody would otherwise have contemplated.



Brainstorming possible options for agreement can change the dynamic of the mediation from confrontational to collaborative. The parties are tasked with suggesting ways by which both their interests might be met. They might even sit together on the same side of the table while the mediator writes up their ideas. It is a path to the elusive win/win.

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Brainstorming can also lead to an agreed outcome that identifies and exploits the Pareto Optimal. Named after the Italian engineer and economist [Vilfredo Pareto](#) , it embodies the strategy of looking for ways to make an agreement richer for at least one (or possibly both) of the parties without being worse for the other and always better for both than mere settlement.

Without appearing biased and without expressing an opinion as to who is right and who wrong, mediators can themselves make suggestions or ask exploratory questions during the brainstorming session that could prompt subsequent agreement.

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