

**Maximizing the Mediation Core Value of “Flexibility”
– How a Rights-based, Humanistic, Creative,
Approach can Survive and Prosper
in a Court Setting**

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Chapter 3 Creativity

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A few years ago I gave a presentation in the United States to a large group of mediators. At the end, a woman, whom I will call Barbara, stood up to ask a question. Barbara said she was a mediator in a court and that she was required to complete a mediation session in no more than 25 minutes. Some in the audience gasped or laughed when they heard that she was expected to mediate in such a small amount of time. Barbara wanted to know if what she was doing, in that short period of time, could still be called mediation. She had been taught that mediation should meet the needs of the parties and discuss possible solutions. To do this appropriately, she thought it would take more than 25 minutes.

When mediation enters institutional settings such as the work place and court, restrictions are often set for mediators about the approach they must use, the time allowed for mediation and which topics can – or cannot – be included in a final agreement. This brings us to the topic of a mediator having options and what it means when a mediator's creativity is lost or restricted. This chapter discusses creativity, the conditions that foster creativity and the extent to which creativity is part of mediation. Finally, Barbara's question – about mediating in a very short period of time – will be discussed.

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What Is Creativity?

Creativity, essential for innovation,¹ attempts to generate new and useful concepts, ideas, processes, objects, associations or other outcomes. The process entails tolerance or even acceptance of contradiction and, if more than one person is involved in developing ideas, it is useful to include those with a variety of thinking styles. Creativity has been the subject of a great deal of research over the last 50 years (e.g., Treffinger 1986) focusing, for instance, on how individuals can be creative at work, in the arts and sciences, in solving tasks and in marketing; children's creativity; creativity of important scholars, and how people can be encouraged to think creatively (e.g., Taylor 1964; Runco 1986; Runco and Okuda 1988; Runco and Chand 1995; Richards and Wilson 2007; Cropley and Cropley 2009; Unsworth and Clegg 2010; Bilton and Cummings 2010; Hon 2011).

Creativity, like cultural competency, is both a process and an outcome. As Shalley and Zhou (2008, p. 4) have noted, "it is an iterative process, involving reflection and action, seeking feedback, experimenting, and discussing new ways to do things in contrast to just relying on habit or automatic behavior." Shalley and Zhou (2008, pp. 5–6) also found that creativity is an outcome defined as something that is seen as "novel" and "useful" and Gilson (2008, p. 305) has expanded this in saying that creativity "as an outcome . . . refers to the production of novel and useful products or services by an individual, group or organization."

Jeff Dyer et al. (2011, p. 2, 235) interviewed almost 100 inventors, talked with "founders and CEOs of game-changing companies . . . (and) studied CEOs who ignited innovation in existing companies" over an 8-year period. They concluded (2011, p. 3):

Most of us think creativity is an entirely cognitive skill; it all happens in the brain. A critical insight from our research is that *one's ability to generate innovative ideas is not merely a function of the mind, but also a function of behaviors*. This is good news for us because it means that *if we change our behaviors, we can improve our creative impact*.²

There has been a lot of discussion about the creative process by itself or as "the steps taken or creative acts that result in (a creative) outcome" (Gilson 2008, p. 305). There are a number of models of this process, generally having three to five stages. Because the models are rather similar, only the one developed by Parnes et al. (1977) is mentioned here. It was chosen because the language is similar, in some ways, to some approaches to mediation. The stages of the creative process in the Parnes et al. model are fact finding; problem finding and defining; idea finding; solution finding and acceptance finding.

¹According to West and Richter (2008, p. 215), "Creativity can be seen as the development of new ideas, while innovation implementation is the application of those new ideas in practice." Using this distinction, it follows that creativity is a necessary prerequisite for innovation. Mann (2011, p. 255) notes that "creativity and innovation are central to thinking and planning for national change and transformation, productivity and performance and social and economic success."

²According to Dyer et al. (2011, p. 21), "creative ideas spring from behavioral skills (that individuals) can acquire to catalyze innovative ideas in (themselves) and in others."

What Fosters Creativity?

Charles Prather (2010, p. 30), a management consultant, begins the discussion of creativity in his book by saying that only 20 % of his workshop participants say they are creative. Yet, when he asks how many of them dream at night, almost all indicate they do. Prather says dreams show we are creative and cites Chic Thompson (2007), author of *What a Great Idea!: 2.0*. According to Prather (2010, p. 30), Thompson says, based on informal surveys of his clients, that these are the top 10 places (beginning with the tenth place) *where* we are creative:

10. While performing manual labor
9. While listening to a sermon
8. On waking up in the middle of the night
7. While exercising
6. During leisure reading
5. During a boring meeting
4. While falling asleep or waking up
3. While sitting on the toilet
2. While commuting to work
1. While showering or taking a bath

Prather (2010, p. 30) underlines that “while at work” was not on the list for creative moments, but it should be noted, that at least several of the activities – such as taking part in boring meetings or listening to sermons – could happen in work settings.

Ariella Vraneski (2006), a mediator in Israel, goes further than Prather in assessing the number of people who can be creative. She says all human beings have the ability to be creative. Even if all people have the capacity to be creative, that does not mean this happens or happens easily. Fostering creativity is particularly important in an intervention process and situations have to be examined to see what fosters or hinders creativity or imaginative thinking.

As creativity has been studied for at least 50 years, experts have clear ideas about what is needed. John Adair (2007, p. 36), an expert in leadership development, noted that “chaos, confusion and informality are the seedbeds of creativity.” Creativity, according to Debra Gerardi (2001), requires openness, listening, risk-taking, trust, and collaboration. Shalley and Zhou (2008, p. 4) indicated that for an individual to be creative, she or he needed to “engage in certain processes . . . for example, . . . examine unknown areas . . . , seek out novel ways of performing a task, and link ideas from multiple sources.” Dyer et al. (2011, p. 3) think that a creative person has to “think different . . . (and) act different.” They found that innovators frequently questioned, observed intensely, networked with diverse individuals and constantly were trying things out (experimenting).

Göran Ekvall (1996), based on work he did in the 1980s, identified 10 factors that are associated with creativity: *Challenge* (to what degree are people challenged and emotionally involved in the work), *Freedom*, *Idea Support*, *Trust/Openness*, *Dynamism/Liveliness* of the organization, *Playfulness/Humour*, *Debates* (different

viewpoints/ideas are discussed), *Conflicts* (if personal and emotional tension interfere with work), *Risk taking* (tolerate uncertainty) and *Idea Time*. Prather (2010, p. 112, 128) also added one characteristic to Ekvall's list: *Value diversity of problem-solving style*. The results of problem-solving exercises are improved by including people with different approaches, "backgrounds, abilities and interests."

Based on all of this, it seems a combination of individual characteristics and situations or structures allows/encourages/promotes creative analysis and intervention. This assessment points to the componential theory of creativity. It is similar to some other theories of creativity in psychology and organizational studies,³ but "with different emphases and somewhat different proposed mechanisms (Amabile and Mueller 2008, p. 35). In this theory, influences on creativity include three within the individual – "*domain-relevant skills* (including knowledge, expertise, technical skills, intelligence and talent in the area of the problem), *creativity-relevant processes* (connected to personality and valuing independence, risk-taking, taking new perspectives on problems, a disciplined work style) and *intrinsic task motivation* (something is of interest to the problem solver rather than undertaken because of extrinsic reward)" – and one factor outside the individual – *the work environment* (Amabile and Mueller 2008, p. 35).

Prather (2010, pp. 32–44) discusses techniques that teams can use to encourage creativity and innovation. These include brainstorming,⁴ the ladder of abstraction,⁵ and pattern-breaking (or out-of-the-box) thinking.⁶ The techniques chosen don't have to be "outside of the box." Perhaps being "on the edge of the box" (particularly if only one person is involved) may be a better place to foster that creative spark combined, of course, with enough room/time/space in the setting for idea development.

Prather (2010, p. 38) also mentioned some possible problems in facilitating creativity. He noted, for instance, that giving a reward for creativity could be problematic if a person who is expected to be creative thinks the reward is for something that the judging panel will find to be acceptable. Prather thinks that when a reward is involved for a creative outcome, that outcome could be "more mainstream and therefore less creative and less innovative."

³According to Bilton (2007, p. 23), "creativity theory has demonstrated a growing skepticism towards individual trait-based models of creativity of the type propounded in the 1960s. Behaviourist models are criticized for ignoring external conditions."

⁴Brainstorming is a group technique "in which group members freely and spontaneously present ideas, in a positive environment in which critical or negative thinking is suspended" (Prather 2010, p. 33).

⁵A ladder is drawn and an abstract/general concept is written at the top of the ladder and, by asking how something will be done, the group can move down the ladder to specific actions (Prather 2010, pp. 35–36).

⁶Mann (2011, p. 257) says, however, "that attempts to 'teach' creativity as a set of generic rules and principles ('think outside the box') and techniques (e.g., 'do some brainstorming') is irrelevant for genuine creativity but may be useful as a tool for 'everyday creativity', i.e. routine problem-solving."

Does Creativity Need to Be Part of Mediation?

Mediators certainly talk about the creativity of their work.⁷ Maria Volpe, a past president of the national mediation association in the United States, in her chapter on police and mediation, cites the work of others (Mayer 2004; McGillis 1997) in noting that mediation's "diverse applications have become increasingly creative" and that "over the years, community-based mediation programs began to creatively and energetically reach out to local organizations and groups." Volpe also thinks mediation is a stimulus that has shown police officers ways to be creative in making talk work. Like Volpe, Steve Mehta (2011) thinks mediation has an effect on participants. Metha said "one of the key things that a mediator can provide for clients is the ability to think creatively." Cheryl Cutrona, a director of a community mediation center, discusses, in her chapter about the mediation centers, her peace theater project. She has told me that this was one of the most creative projects she has put in place. Ron Kelly (Hedeen and Kelly 2009, p. 119), a San Francisco-based mediator, said that he "treated the development of (his) entire mediation practice as an art project, with creativity at the heart of it" and that there is "enormous room for creativity in (the) field (of mediation)." Eleanor Nwadinobi, in her chapter about her mediation work on behalf of widows, reminds us that "creative and innovative approaches that are employed in the process of mediation should be recorded for dissemination."

Public policy mediators – including those who work on environmental matters – think there is a big "opportunity for creativity in their work" (Goldberg and Shaw 2010, p. 247). According to Susan Carpenter (Goldberg and Shaw 2010, p. 247), "the range of creativity can be much greater in the public policy area (than other areas of mediation)... Many (government) agencies (in the United States) are shifting toward a more collaborative practice... and they want a mediator to come in and help them design a conversation so that issues and perhaps potential outcomes can be outlined up front – it's more conflict prevention than intervening." And Lawrence Susskind (Goldberg and Shaw 2010, p. 247) has written:

the opportunities to be more creative as a public policy dispute mediator arise partly from the fact that there are more issues involved in such conflicts, in comparison to typical commercial disputes, which creates greater opportunity for creative trade-offs, and that mediation is also less a matter of routine in public policy matters.

Howard Bellman (Goldberg and Shaw 2010, p. 248) also thought there "was a greater likelihood of creative problem solving in public policy matters than in business/commercial matters." But he also noted that even if a business case involves a court or administrative agency, there is still a lot of "room for creativity (in the) remedies."

Mediators frequently have stories about the creative outcomes of their mediations. It is not unusual for the parties to agree on points that no one (e.g.,

⁷Abramson and Moore, who run community conferences but are not mediators, write about the creative outcomes in the conferencing process they use with schools in their chapter in this volume. They also indicate that they do not think of mediation as a creative process.

parties, representatives, mediators) had thought of before the mediation. The creative ideas for resolution come out of the exchanges and the process that has been put in place to look for solutions. As examples of creative outcomes, please see the two boxed examples in this chapter. One example comes from Mary McLain (personal communication. April 27, 2011), a former federal mediator in the United States who dealt with employment disputes, and the other from Cathleen Kuhl (personal communication. May 19, 2011), a mediator who works in a court setting.

Example One *I worked for the U.S. government mediating complaints of employment discrimination. Had these complaints been litigated and a finding made for the complaining party, the remedy would be defined by law and precedent. In mediation that precedent is the standard in the minds of the attorneys, but in the eyes of the parties there are more possibilities.*

Once, in an age-discrimination complaint, a 70-year-old, long-term employee was laid off, indisputably because he was of retirement age. While he had talked about retirement, he wasn't quite ready yet. He thought his longevity, expertise and loyalty protected him. And, as he and the owner had a long personal history, his feelings were hurt when he was abruptly let go. The employer thought the selection of this man was a practical solution as it would cause the least harm to the business and the other workers.

The retail business catered to collectors, hobbyists and children interested in the hobby. The employee, like the others in the rather small company, was passionate about this hobby and, as much as anything, very sad about no longer being in the company of like-minded fellows. When the employer began to understand the other man's perspective he proposed, and they settled on, his helping the employee secure an especially coveted and rare piece that, without the employer's assistance, would have been very difficult to obtain.

No precedent recommended this remedy.

Mary McLain

Creativity is not only found in outcomes, however. It also is found in preparatory or preventive work, the design of the process, the approach that is used in mediation, the place the mediation is held, the way in which participants are brought into the mediation, the way in which new information is introduced and the follow-up period after a mediation. While there can be standard ways to handle all of these matters, mediators need to use expertise⁸ and intuition to try what they think will be productive. If there is a sponsoring organization of some kind, it's approach needs to be open enough to allow the time and space for the mediator and the mediation to be creative.

⁸According to Mann (2011, p. 257), "Creativity is fundamentally domain specific: creative people are very rarely creative across a range of fields and domains. They are bright, motivated people who are creative through immersion and deep knowledge in a particular domain. This highlights the importance of in-depth knowledge in a domain to be creative."

Example Two *When I think about the value of creativity in the mediation work that I do for the Court, what comes to mind is what I always tell parties about mediation. In mediation, parties do not have to keep the focus of their conflict solely on the “legal” issues and their solutions can often be remedies that the Court would be very unlikely to provide or order. Giving parties the freedom to explore all aspects of the conflict, not just the legal aspects, allows them to be creative in how they frame the conflict and the issues, as well as how they choose to resolve it.*

Let me share with you one story that illustrates this. Many years ago, I mediated a case which involved a violation of a municipal noise ordinance. The parties were neighbors, one lived in an apartment on the first floor and the other lived in the apartment above on the second floor. The First Floor Neighbor (FFN, for short) initiated the complaint, stating that he was a student and could not study because of the noise from the apartment above him; he said it sounded like someone was dropping bowling balls on the neighbor’s floor (his ceiling). When this would happen, FFN would bang on the ceiling with a broom handle and sometimes the noise would stop. FFN complained to his landlord about it to no avail and, finally, he called the police several times. Sometimes the noise problem would abate for a while, but start up again later. The Second Floor Neighbor (SFN, for short) was a single parent who worked two part-time jobs and had a 3-year-old son.

In mediation, both neighbors began to talk with each other. Both shared that neither had spoken to each other about the FFN’s complaint; FFN and SFN did not know each other. FFN asked SFN what she was doing up above to cause the noise. SFN explained that she had a very active 3-year-old who ran around the apartment a lot, falling down, playing games, bouncing balls . . . ; she wasn’t sure what she could do about the noise because she simply couldn’t keep her son still all the time.

They realized that their apartments were the same layout, i.e., her living room was above his, her bedroom above his, and so on. They began working on options: SFN making sure her son played in a room not above FFN’s study area, a time schedule when SFN would try to keep her son quiet so FFN could study, and SFN suggested she’d try to save up enough money to buy area rugs to put over her hardwood floors to deaden the noise. When SFN made that suggestion, FFN mentioned how much he loved hardwood floors and that his apartment had wall-to-wall carpet. SFN replied that she wished her apartment had carpet, because she worried about her son hurting himself when he fell down on the hard wood. At that point, the FFN suggested to SFN the idea of switching apartments. Since the apartments were exactly the same layout and the same rent, that is what they agreed to do. FFN got the hardwood floors and the quiet he wanted; SFN got the carpet she wanted so her son could play safely and not disturb FFN.

Cathleen Kuhl

The research literature and experience show that creativity is not just in the hands of the mediator, but also in the context in which the mediation takes place. In sponsored mediation settings, for instance, I have been able to talk with participants in advance, design different processes, arrange group site visits for the participants, hold mediations that took more than the expected time (e.g., 2 days rather than 1 day), and introduce expertise (e.g., from an invited guest, through a conference call or through the distribution and discussion of a research paper). All of these were not regular or expected practices in particular mediation settings. None would have been possible without the trust and support of the sponsoring organization, which did not have to be informed about these decisions before or during the mediation.

I believe that mediators think creativity is important at all levels of practice and so I have included the concept in my definition of mediation.⁹ I think that something that is centrally important has the possibility of being lost or overlooked if you don't explicitly note its importance.

And What About Barbara's Question?

Barbara had asked if she would still be considered a mediator if she had no more than 25 minutes to do a mediation in a court setting. She, and the audience, obviously had never heard of Ron Kelly (Hedeem and Kelly 2009) and his 30-minute mediations.

Kelly (telephone interview, September 9, 2011) has been a mediator more than 25 years. He teaches periodically with the University of California Berkeley's Continuing Legal Education Program and conducts mediation trainings. He has had a lot of experience mediating cases involving business professionals. He said his reputation drew clients interested in his assistance and that he never was a mediator for an organization that strictly dictated how a case was to be handled or indicated that it should be done in a very short period of time (e.g., a few hours). For the last 11 summers, he has offered mediation at Burning Man, a week-long event in the Black Rock Desert in Nevada that attracts "tens of thousands of participants" and is dedicated to "community, art, self-expression and self-reliance" (<http://burningman.com>).¹⁰ According to Kelly (Hedeem and Kelly 2009, p.108):

⁹If a mediator is working with an organization that is going to put a mediation program in place or redesign a program, it is easier for the company representative to see that creativity needs to be part of the program design when it is part of the definition of the field.

¹⁰In 2011, the Burning Man event was a featured part of an exhibit about the living frontiers of architecture at Louisiana, the Danish museum of modern art. The exhibit curator, Kjeld Kjeldsen (telephone interview, November 22, 2011) had never been to Burning Man, but an artist, in 2006, had told him about his contribution to the event. Burning Man was described in the exhibit catalog (Louisiana 2011, p. 24) as a place "of alternative dwellings and vehicles that reflect all sorts of utopian ideas of a different world."

The festival operates with a “gift economy,” where participants come (to) give away something they’ve created or collected. I was so moved. I felt that if I were a salmon fisherman, I would have brought a hundred pounds of salmon to give away as sushi.

I’m a mediator, so I set up a booth to provide mediation services.

Kelly (Hedeem and Kelly 2009, p. 108) said the festival’s “emphasis on creativity” led him to design a booth¹¹ and a process “that would be rapid and focused.” Kelly (telephone interview, September 9, 2011) tells all his participants that he facilitates 30-minute mediations for couples and gives coaching to individuals in 15 minutes. (He uses a kitchen timer to keep track of the time.) Kelly said people came to discuss “pretty normal relationship issues with couples and between family members.” He described his process in the following way (Hedeem and Kelly 2009, pp. 109–110)¹²:

When a couple comes in, I explain that first I’ll listen to each one for five minutes. I say to one of them, “I’m not going to say anything, I’m just going to listen. I want you to tell me, as open-heartedly as possible, what’s going on for you.” I do my very best to be fully present with them and to listen with complete attention. I don’t say a word. (*He says he might make a hand motion . . . for instance, to continue talking because there is still more time.*)

Then I turn to the other person: “I don’t want you to respond to what the other person said. I want you to tell me as open-heartedly as possible what’s going on from your perspective, and I’m just going to listen to you.”

Then I explain to the first person, “The next five minutes is very structured. (*It is directive regarding the process, but not the content.*)” I’d like you to answer these four questions:

1. Do you want to solve the problem?
2. If you had to put it in one sentence, just for now, what’s the problem you want to solve?
3. With any problem there are a number of ways you could try to solve it. Some of them will work better than others, some you don’t even want to try. I just want you to list some of the ways you could solve this problem.” (*I often have to move them through their list without discussion: Suppose you’re on a game show and they’ll give you \$100,000 for each way you can list.*)
4. Then in the final minute, I ask, “If you had to pick one just for now—you could pick a different one in five minutes—which one seems best to you

I ask the same questions of the other person. To start the last ten minutes, I usually depersonalize or normalize the conflict. I might say, for example, “This is a very common situation I see here. The extreme conditions can easily ruin anyone’s food in an hour,” or “Yes, there’s a great deal of easily available sex here. It puts a severe strain on many relationships.” Then we work to blend together and flesh out the solutions they’ve

¹¹The booth was a tent (enclosed on three sides to provide some shade and protection from blowing sand) with three folding chairs. Over the entrance was a large sign that said “Fighting With Anyone? Help & advice here.” Kelly (telephone interview, September 9, 2011) said he really doesn’t give advice, “but that is OK on the sign.” At the side of the tent entrance was a smaller sign: “The Mediator is in.” (Sheppard 2010).

¹²In this quote, there are quotes and comments that appear in parenthesis and italics. These points either appear elsewhere in the Hedeem and Kelly (2009) article or were mentioned by Kelly in the telephone interview on September 9, 2011.

identified.” (*“The point is not to have them come up with the right answer in five minutes; it’s to encourage them to brainstorm and select a possible resolution in five minutes.”*)

In the last five minutes, if I’m working with only one person, one side of the conflict, I might help them think through how they will approach the other person. I often role-play how they will actually talk with the person they’re fighting with.

In describing the work of a mediator, Kelly (Hedeen and Kelly 2009, p. 116), said the following:

Immediacy speaks to how you need to be flexible and intuitive as a mediator, and the process needs to be fluid. You can have steps, a model, a game plan you think you’ll be working from, but after the first ten minutes, the bull’s going to leave the chute and you just need to hang on. Being present with parties, observing them to know whether they’re sad or angry, or needing more information, or about to walk out—this speaks to the principle that skillful mediation is knowing where the mediation needs to go. And it’s the opposite of following a game plan or a recipe.

Kelly (Hedeen and Kelly 2009, p. 118) said he used this 30-minute approach in a number of trainings and that it is a very good training tool for mediators in terms of “listening (and) actively facilitating problem solving.” He also thought it “would work well in small claims court with severe time constraints.” Although Kelly (telephone interview, September 9, 2011) never mediated in a small-claims court, he said he initially started thinking about developing a short approach to mediation because small-claims mediators enrolled in his training classes and told him that they were under a lot of pressure to mediate quickly.

Both Ron Kelly and Barbara were mediating and conducting the mediations in a short time. There were differences: (1) Kelly chose the 30-minute rule for himself, while Barbara was dealing with a 25-minute system imposed by the court. (2) Kelly told the participants that this mediation will take place in only 30 minutes and they can agree to that or not. A court-imposed time line can make court participants think they have few options because they must agree, or go before a judge or hearing officer. (3) Kelly could make suggestions at the end of a mediation (e.g., for continued mediation, couples counseling) although he says that he never does this (Kelly, telephone interview, September 9, 2011). The court might – or might not – allow Barbara to make suggestions for continued discussion. (4) If the parties in Barbara’s case would come to an agreement, Barbara would have to write that agreement and might have to have the agreement approved by a court representative. Kelly (telephone interview, September 9, 2011) never included a written agreement in his 30-minute mediations. (5) Kelly’s mediation already requires five additional minutes and, writing an agreement, would add additional time. (6) Kelly’s mediations did not end with written agreements, while Barbara’s cases could end with a settlement that would be considered final and binding.

Courts, for a variety of reasons, may want mediation done in a short period of time, cases handled in a specific way and no contact with disputants prior to a mediation. Courts may have decided that mediation is less expensive than standard court processes; cases sent to mediation are not complex and so they do not require a lot of exploration; and mediation should not be viewed – by either the mediators or the parties – as a creative process.

The short mediation process that Barbara described might be improved in a number of ways. First, while it can be understandable that the court has a standard approach (as this is easier to explain to mediation participants and meets the court's needs), the process would be improved if the mediator could decide when a situation warrants exceptional handling (e.g., a longer time period). This modification might allow for the creative handling of some cases and better meet the needs of some parties or kinds of cases. Second, participants would be making an informed choice if they understand that the court-backed approach must take place in 25 or 45 minutes but also are told (probably when mediation is first suggested or required) that (a) there are different approaches to mediation and (b) there are other mediation options in the community that would be acceptable (using different approaches and lengths of time). Third, it would support the integrity of the mediation process if the court did assessments periodically about how its process worked for different kinds of parties and cases and implemented changes based on what it found. Fourth, it might be useful to look at Kelly's approach and see if it could be adapted for use in some situations in court or work settings.¹³

Conclusion

The process and the outcome in a mediation, whether it involves two parties or a number of large groups, can be quite creative. Research on creativity shows that time and space are particularly important for the mediator as well as the participants. If a sponsoring organization puts restrictions in place – for instance, limiting time or insisting that only one approach be used with all cases – that can affect the quality of the mediation process and the outcomes. It also means that all participants in a mediation may think this is the only way it can be done.

Göran Ekvall (1996) identified 10 factors associated with creativity in a team or work environment. A number of those factors should be taken into account in assessing the creativity of a mediation process. These are challenge (where mediators are experiencing “joy and meaningfulness” in their work; freedom (independence); time for ideas; support (in this case of any sponsoring organization for the mediation and the mediator) and trust (of the mediator and the process). Charles Prather added diversity of problem-solving styles or, in this case, allowing or encouraging different approaches to mediation and discussions of these approaches by the mediators.

Sponsoring organizations may need to be reminded that mediation is an art and that it is creative in terms of process and outcomes. They also may need to be given some examples of how different mediation processes/circumstances can result in different outcomes. Sponsoring organizations may need to be told about the advantages of a creative mediation process (encouraging listening, empowerment,

¹³There is the possibility that the more mediation organizations or groups of mediators call attention to all these issues, that courts might simply decide to rename the process they use as something other than mediation.

problem-solving, good citizenship, commitment to fulfilling settlement terms and, possibly, caring). They also may need assistance in identifying the variety of designs that foster creative mediation.

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