

Overcoming Impasses in Mediation: The Potential of Creativity Against the Constraint of Time

American Bar Association Section of Dispute Resolution Annual Conference
Washington, DC
April 7, 2018

Tessa Manuello, Legal Creatives

Reporter: Andrew F. Mutavdzija, American University Washington College of Law (2017),
Washington Foreign Law Society Board of Governors

Program Description: Why are some people able to reach agreement faster and better than others? People in conflict have a natural tendency to value their own points of view, see the fixed pie and each believing there is only one way out. Under time pressure, judgments and biases get triggered quickly. How to get out of it? Improv skills can be a powerful tool for deeper understanding, creative growth, and better outcomes. Tessa invites you to take on an experiential journey through the art and science of negotiation, using improv games and theory to develop your negotiating and dispute resolution skills.

Tessa Manuello, an accredited mediator, trainer, and entrepreneur based in Montreal, Canada, presented this workshop on exploring and practicing creativity to overcome impasses in mediation, with a particular focus on using improvisation. Her objectives for the hour-long session were to explore conflict resolution under time pressure, develop creativity in conflict resolution, and experience improvisation as a skill that fosters creativity. About fifty or the sixty attendees identified themselves as both attorneys and mediators.

The first exercise asked each table of approximately eight people to think of three words that define the notion of dispute resolution in complex times, which was the title of the conference as a whole. A common theme among the replies was “uncertainty.” The next exercise asked the groups to come up with one definition of the same concept. The sentences put forth ranged from pithy (“Problem-solving in a sea of emotions.”) to detailed (“Listening empathetically, non-judgmentally, and respectfully, so that people can understand the respective needs and possibly accommodate one another.”).

Together, these activities were designed to bring forth the feeling of time-induced pressure and the skills needed to maintain the dialogue throughout. Participants had to be spontaneous in their choice of words, attentive to what was already said and, ultimately, flexible when preparing to announce the ones the table group would offer to the entire room. Parties under pressure can too often take the easy route and retreat to their default positions, refusing to further negotiate the problem. Shifting the conversation toward overcoming that obstacle, Tessa briefly overviewed creativity’s role in conflict resolution. This begins with generating ideas; novelty, relevance, and originality are the three elements that make up a creative idea. Further, while an idea is nothing more until it is disclosed, used, and acted upon, improvisation is the art of creating and executing on the spot.

For the last exercise, the room was divided into pairs. The pairs were instructed to think of a mediation they had participated in or mediated that had arrived at an impasse. While Person A related their story, Person B was to reply to each statement with “Yes, but...” Then they switched roles, except the responding party replied with “Yes, and...” The takeaway from this exercise was not immediately evident to participants, but once Tessa began the feedback portion of the exercise, nearly all pairs had an insight or idea to share.

Summarizing the entire workshop, one person stated that, during the group exercises, “We had some undesigned leaders. In mediations, sometimes an alpha can overpower the whole conversation.” The result is a lack of creativity because you have little time and an overbearing party; therefore, it is not collaborative and the odds of reaching an unsustainable settlement increases.

The gist of “Yes, but...” and “Yes, and...” was that the former can easily be perceived as dismissive no matter the intent, whereas the latter will almost certainly be perceived at least as an acknowledgement if not an affirmation. “Yes, but...,” according to one participant, creates an inherent resistance and even disrespects the other person’s position, making it much more difficult to get to a communication level that leads to solid resolutions. However, in a testament to the variances between each mediation proceeding, two teams actually found positives with the “Yes, but...” approach. Rather than maintaining an environment of negativity, they said each retort compelled the speaker to attempt to rephrase the statement into something more positive or at least say it in a new way.

In summarizing what she had learned in the workshop, one participant’s statement served as an apt description of what animates many aspects of the legal profession, from the mediation table to the courtroom: “People want to be heard.”

The presenter was Tessa Manuello. She is the founder of Legal Creatives and Lawclick. More information is available at tessamanuello.com and she can be reached at tessa@tessamanuello.com.