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Don't Wear a Mask When You Swim in the Pool of Irrelevancy

For any mediator, one of the challenges faced is how to encourage the parties and attorneys of record in the litigation to brainstorm and seek creative solutions. Lawyers become focused on the litigation process because it is demanding and the client may be a novice to dispute resolution. Sometimes they do not take time to sit down and discuss the history of the relationship between the disputants. Lawyers are trained to search for relevant information, but that filter can be problematic in the context of mediation.

Being a creative problem solver is a learned skill. You have to practice this process. One way to widen the scope of discussion is to get information on the parties' underlying needs or interests. What are their agendas? How are their businesses faring? Why are they bringing *this lawsuit now*? What else can the defendant give the plaintiff that has value? What are the challenges outside the litigation faced by the plaintiff? Who are their enemies? Consider employing a paralegal, staffer or search firm to go beyond social media and look at their actual location, factory, place of business, competitors and customers. Where do they advertise? You should spend a few hours in any complex case looking very broadly at the businesses and individuals involved in the conflict.

A few examples: In a lawsuit brought by a homeowner against a homeowners' association that involved large assessments and counterclaims of mismanagement, somebody suggested buying the homeowner's interest so he

Brought to you by
David W. Henry, Esq.



Should you have additional
inquiries, please contact:

David W. Henry, Esq.
Shareholder
Professional Liability Department

Florida Supreme Court Certified
Civil & Appellate Mediator

Member, National Association
of Distinguished Neutrals

Landmark Center One
315 E. Robinson Street, Suite 550
Orlando, FL 32801
407.420.4418
dwhenry@mdwcg.com

would no longer have a reason to sue the association, and to also tie the settlement of the lawsuit with a sale of the home. And if there is insurance, have the carrier fund part of the closing costs. In another case involving a trade dress claim between competing manufacturers, we used Crayola Crayons to identify the product colors that were claimed, those off-limits and those fair game. In a medical malpractice claim, the defendant may opt to offer a memorial or a change in institutional procedures. What if a commercial property developer offered free rent at another location currently vacant to the opposing party in lieu of money?

In mediation I ask about the history of the relationship. "When were things good?" and "how did it go wrong?" are simple but often very revealing questions. Hearing both sides answer these questions gives you some valuable insight as to *why* they are suing each other *now*, and they sometimes provide a clue on how to convince them to stop.

Lawyers may not appreciate the value of information that does not appear relevant to the litigated dispute. The trail to a mediated solution, however, often is revealed by looking away from the pleadings and motions to finding hidden interests, fears, goals and opportunities that are irrelevant to the litigation process. Dive into the deep end of the pool of irrelevancy and you may find sunken treasure not apparent from the surface of litigation.

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ATTORNEYS-AT-LAW

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