

The Master Mediator / Part 2

Looking My Way: Thinking Fast and Slow . . . and Mediator Sense

BY ROBERT A. CREO

MEDIATOR SENSE BECOMES BEST PRACTICES

A foolish consistency is the hobgoblin of little minds.

— Ralph Waldo Emerson.

Mediator Sense involves mediators taking deliberate process and communication actions, such as proposals, directives or inquiry. Mediation is not mechanical or formulaic and does not follow a consistent procedural course of conduct. Mediation involves a series of strategic macro and micro choices by the mediator. Macro choices involve the next “goal” or “choice point,” while micro action involves the steps or tools necessary to reach the goal. Christopher Moore in his seminal book, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass; 3rd Edition Revised (2003), describes these as “moves” made by the mediator in response to the situation. These “moves” are based upon heuristics of Mediator Sense. Some of the most common tenets may be articulated as:

- Engagement between mediator and all participants consists of listening to the individual and collective narratives;
- Attention control becomes routine; complex facts are absorbed into memory;

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- Authenticity builds rapport and trust with the participants;
- Initial divergent perspectives are acknowledged, validated and legitimized as reflecting the positions, interests, emotions, and values of the participants;
- Multiple, and even inconsistent, outcomes are recognized as being within the range of possibility, without endorsement by the mediator;
- Transparency, especially on procedural issues, is effective;
- Flexibility and creativity are honored; improvisation is encouraged;
- Expectations and risk tolerances are accessible and weighed appropriately;
- Empathy and compassion are innate and expressed appropriately;
- Respect for past, present and future relationships is respected by every move;
- If not now, when? can be addressed with confidence;
- Pause, patience and pacing are effortless;
- Silence is comfortable;
- The mediator becomes an alternate or surrogate speaker for a participant, so that adverse and difficult messages may be conveyed in a productive manner.

Examples of Mediator Sense in action include:

The Best Next Move: Your Fault?

A motor vehicle accident case involved four parties: two plaintiffs and two defendants in a case scheduled for trial a short time after the mediation session. The expert physician retained to testify agreed to extend the period for cancellation of his appearance without a fee until 4:00 p.m. on the day of the mediation session. The defendants were willing to pay what most participants considered to be in excess of the

case value, which was \$10,000 less than one of the plaintiffs’ bottom line. The plaintiff instructed the mediators to present her demand on a “take it or leave it” basis. Although her counsel agreed with our recom-



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mendation against taking and presenting that position, I indicated that it would be done, though I did not expect the defense to meet her final demand and thought the resulting impasse would cause the shift to focus on the other claimant. After the expert deadline passed, and we entered the room to touch base for a final time, the plaintiff greeted us with an exhortation that “you have just cost me thousands of dollars in expert fees.” I acted in an authentic and transparent manner by immediately pushing back and challenging her accusation. I responded that if there was a problem, it was based upon her own choice, which went against the recommendations of the mediator and her own counsel. I was direct and forceful in my meaning and the language used to convey it. She indicated that she would now accept a lower settlement, but only if she did not have to pay the expert fee! Fortunately, despite the late hour, her counsel was able to work it out with the physician and the case settled.

I did not spend any time reflecting upon my response or carefully weighing each word. I confronted her baseless accusation directly, while engaging her in a respectful manner. I did not apologize or attempt to justify process choices or pacing. I explained that she took the risk of presenting an ultimatum to the defen-