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## CREATIVITY IN MEDIATION

by *Phyllis W. Cheng\**

“Creativity is just connecting things,” according to Steve Jobs. This maxim about creativity is applicable to the mediation forum, where opposing parties come together to resolve disputes before neutrals like ourselves.

While most disputes involve money damages, compensation is a proxy for solutions missed in the past and the harms that followed. As mediators, we are trained to negotiate between the parties’ offers and counter offers. We know the techniques for bracketing, reading the signposts in the midpoints, conveying mediator’s proposals, and other ways of reaching resolution. However, as former French Prime Minister George Bidault observed, “a good diplomatic agreement [is] one with which all parties [are] equally dissatisfied.” Nonetheless, in the private world of mediation in which the parties’ true motivations can be revealed, neutrals can creatively bridge that satisfaction gap.

Here are a few examples from my own settlements negotiations that employed creativity.

### ■ **Naming First Amendment Regulation after Plaintiff**

When I was director of my state’s civil rights department, my agency investigated a housing retaliation complaint against a homeowner, who posted yard signs protesting a group home, possibly violating statutory prohibitions on harassment against persons with disabilities. The homeowner sued my department alleging a First Amendment Freedom of Expression violation. The Circuit Court in our jurisdiction had ruled in favor of a homeowner on a similar First Amendment case in which a federal agency conducted an identical type of

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investigation. Thus, my department should not have investigated the complaint under that precedent. As a client, I participated in a judicial settlement hearing in federal court. In addition to damages, I understood that the homeowner needed acknowledgement that she felt her First Amendment rights had been violated. When we could not bridge a monetary gap, I introduced the idea that my department could hold hearings, promulgate a First Amendment housing regulation, and name the regulation after the plaintiff. That creative approach settled a case that could have undergone protracted litigation. The case settled with the plaintiff publicizing that my department did the right thing. That First Amendment regulation is still in force today.

### ■ **Gift Card Purchased from Defendant for Plaintiff**

In a sex discrimination, harassment, retaliation, and wrongful termination case I mediated, the former employee was a long-time fan of the entertainment company that terminated her. She made a significant monetary demand, but gave the employer the option of converting that demand into the form of lifetime access and discounts to the company's venues, which would have meant huge settlement savings for the employer. The employer refused to set such a precedent for its terminated employees. I understood that the employee needed acknowledgment that, aside from her job loss, she felt devastated for losing her connection to the company. When negotiations drew to an impasse, to close the gap, I bought a gift certificate out of my own pocket from the employer's Web site and presented it to the employee. Both parties benefitted equally. The employee appreciated that I understood her lifelong devotion to the company. The employer appreciated the creative solution. The case settled amicably.

### ■ **Professor's Book in University Library**

A professor alleged his former employer, a university, retaliated against him following an administrative settlement of his complaint for age, race and disability discrimination. The professor claimed that the university failed to honor the terms of the settlement agreement, impeded his research and teaching opportunities, and barred him from attending professional conferences. The trial court granted summary judgment for the university, which was overturned and remanded by the appellate court. At mediation, to close the monetary gap, I proposed that the university consider adding the professor's new academic book to its library collection, and that it dedicate a space in the

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library to showcase the book for a time. The professor appreciated the respect paid to his scholarly work. The university embraced the creative solution that benefitted its student body. The case was successfully resolved.

### ■ **Once upon a Mattress Class Action**

A couple of consumers challenged on appeal the trial court's denial of class certification in an action against a mattress store. They alleged unfair competition and unfair advertising on the size of the mattress they purchased. The couple had become unhappy when they replaced high-end fitted sheets purchased at the mattress store with less expensive sheets bought at a box store, such that the new sheets no longer stayed on the bed. The mattress store alleged that the consumers lacked standing, their claim had no merit, they had kept and enjoyed the mattress, and they had declined a full refund. Nonetheless, mattress store had spent \$150,000 defending the potential class action. After conferring with the parties at mediation, I ascertained that it was the sheets rather than the mattress that was the source of the problem. In addition to a reasonable monetary settlement, I proposed that the mattress store consider providing the consumers with three sets of its high-end sheets that fitted the mattress. The mattress company agreed to do so. The consumers felt acknowledged that they could not get a good night's sleep. The class action settled globally at both the trial and appellate courts.

### ■ **Queen for a Day**

An octogenarian in a wheelchair had been a long-time bus rider. In the incident at issue, the liftgate of the bus allegedly crushed her foot. The bus rider's son, a music industry executive, hired private counsel to sue the municipal bus company for disability discrimination and other torts. Although the injury was from a single discreet incident, the octogenarian aired over 30 years of alleged abuse by the bus company for passing her by, not providing operable liftgates, failing to accommodate her, and other acts she perceived to discriminate against persons with disabilities. The statute had run on most of these other incidents. To bridge the monetary gap at the mediation, I asked whether the bus rider would consider giving feedback to the bus company on how to better accommodate persons with disabilities. She was pleased that her years of feeling disrespected was acknowledged, and was eager to provide feedback. As part of the settlement, the bus company agreed to chauffeured the

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octogenarian as a V.I.P. to and from a high-level meeting with the heads of ADA, civil rights, and bus dispatch to hear her constructive feedback. The case ended with satisfaction on all sides.

### ■ **Returning Inmate's Personal Effects**

An inmate died of a drug overdose while incarcerated. His mother and family sued alleging that a county and its law enforcement officers deprived decedent of his 42 U.S.C. § 1983 rights, were negligent, failed to summon medical care, and committed other violations for which municipal liability was imputed. At mediation, mother was distressed that her late son's personal effects had been lost between different jails. In addition to the monetary settlement, I proposed that the county use its best efforts to locate and return decedent's personal effects to his mother. Even though it was a small accommodation, this additional term appeared to comfort the grieving mother. The county was willing to do all it could to comply. The case settled, avoiding further litigation.

In all these examples, damages constituted the primary remedy, but the creative solutions made settlement possible. As mediators, we can decipher the essence of the dispute, and carve out solutions that even courts cannot order. Accordingly, in addition to damages, non-monetary but creative solutions are worthy of our consideration in resolving disputes.



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