

Green Eggs & Ham and Other Creative Strategies for Effective Mediation

by Joe Epstein, Esq.

Have you read a book to your child or grandchild today? If you don't have a child or grandchild, borrow one and read him or her Dr. Seuss' great children's book "Green Eggs and Ham."¹ It's a wonderful book that grabs your attention and makes kids laugh.

Do your mediation statements have the same punch, rhythm, humor, repetition, alliterations and power that are found in Dr. Seuss' book? Have you even considered using this ageless children's book as a measuring stick for your mediation statements? Do you draft your mediation statements to get the attention of your opponent and the mediator? Do you dramatically and emphatically convey information? Do you use humor and charm in the mediation statement and at the mediation? Do you use persuasive tools to influence your opponent and the mediator? Figure out how to make the complex simple. Figure out how to make the voluminous concise. Like Dr. Seuss, figure out how to create a hook or theme and sell it in your mediation statement and at your mediation.

If you need to approach your mediation from the serious side consider Shel

Silverstein's children's classic, "The Giving Tree."² This is an incredibly powerful short story. Its poignancy cannot fail to touch the reader and the listener. Do your mediation statements have an effective theme or story line like Silverstein's does? Are your mediations statements concise and clear? Do they touch one's emotions? Dr. Seuss persuades the reader to try eating "green eggs and ham" while Shel Silverstein creates a strong sense of compassion for "The Giving Tree." Are you willing to take creative risks in order to be this persuasive?

My point simply stated is that lawyers need to be story tellers as much as lawyers. They need to start developing their theme with their complaint and build the theme with their depositions and discovery. They need to go beyond legal writing to produce effective and persuasive mediation statements. Indeed, in this day and age, parties should consider going high-tech by utilizing CD ROMs that, like mediation statements, are provided in advance of the mediation. I have seen CD ROMs used powerfully to present fraud cases by juxtaposing deposition excerpts with key documents. Other effective CD ROMs have contained accident recon-

structions and day-in-the-life portrayals of the catastrophically injured.

Creative mediation not only requires marshalling the law and the facts of the case. It requires applying and utilizing learning from other fields such as psychology and sales.³ Risk tolerance, "reactive devaluation," charm/likeability and judgmental over-confidence are just four of the concepts "borrowed" from the fields of psychology and sales that advocates can combine with an effective storyline to have a successful mediation.

In planning for and participating in a mediation, a party must size up his own and his opponent's risk tolerance. Factors to consider include: (1) the party's financial resources, (2) the relevant law, (3) the pertinent facts, (4) aggravating factors, (5) the amount in controversy and (6) the presidential value of the case. As a mediator and as an advocate, I have found that the number one persuasive factor relating to negotiation is fear. Fear may be of the unknown facts or it may be the fear of losing.⁴ Knowing how to effectively use fear and its flipside – power – at a mediation requires creative planning.⁵ The seed of fear may be planted in pleadings, in depositions and during

mediations. Indeed, you want to determine how the seed of fear can bear fruit at the mediation.

Parties should consider the related concept of "reactive devaluation" in creatively planning for mediation.⁶ "Reactive devaluation" is the tendency to devalue proposals or arguments made by an adversary. Thus, if you want to try to persuade an opponent about an issue you might consider having a mediator, who is perceived as a more credible source; make your point to your opponent. Similarly, if you want an opponent to say yes to something you are proposing, you might do well to remember that some people prefer to say yes to individuals they know and like.⁷

Parties would do well to consider, too, the concept of "judgmental overconfidence." That is, parties should note that they have a tendency to over evaluate their case and overrate their own arguments. That is, "[w]hat you see depends in part on where you stand, who you are and what you've seen before."⁸ Thus, we filter facts to fit our pre-conceptions and our pre-dispositions. You can get a reality check with a pre-mediation focus group or by "testing" your position with the mediator in caucus. In the right case and at the right moment you may want to share pre-mediation focus group findings with your opponent.

In summary, advocates should consider combining the simple, clear, and concise art of children's stories with the sophisticated insight of experts in persuasion and sales. Remember, after a book's worth of pestering by Sam to eat green eggs and ham the Seuss character finally tells Sam:

Sam!
If you let me be
I will try them
You will see.
Say!
I like Green Eggs and Ham!
I do! I like them, Sam – I – am!

And I would eat them in a boat.
And I would eat them with a goat....
I do so like
Green Eggs and Ham!
Thank You!
Thank you,
Sam – I – Am!⁹

Be catchy, be creative, be concise and you and your client could walk away with a very satisfying result in your next mediation.

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This article is dedicated to my grandson Justin.

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Endnotes

- ¹ *Green Eggs and Ham*, Dr. Seuss (Beginner Books 1960).
- ² *The Giving Tree*, Shel Silverstein (Harper Collins 1964).
- ³ See generally, Joe Epstein, "The Powers of Psychodynamics in Shaping Mediation Outcome," *THE COLORADO LAWYER*, January 2004, Vol. 33, No 1, p. 45.
- ⁴ *Id.*
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ *Id.* citing Robert Cialdini.
- ⁸ *Id.* citing Robert Mnookin.
- ⁹ Dr. Seuss, *Green Eggs and Ham*, (Beginner Books), P54-62.

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