

Creativity and Problem-Solving

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Editors' Note: It's routine for people to recognize that negotiations demand creativity. It also seems routine for negotiations to result in rather uncreative solutions, in which many opportunities for a better deal all around were missed. In this chapter, Brown suggests some ways to break out of the predictable—and to get your counterpart to do so too. This chapter should be read in conjunction with the very different forms of creativity discussed in LeBaron & Honeyman on Arts.

Negotiation experts seem to agree that creative solutions are often the key to reaching value-maximizing outcomes in integrative, interest-based bargaining. Sticking to the problem as it is initially framed and considering only the solutions that most readily present themselves will sometimes yield optimal results, but more often, situations will require the parties and their representatives to think more expansively. This process of thinking more expansively is often referred to as creativity or creative thinking. Some commentators distinguish creative thinking from creativity, arguing that creativity “is more value-laden and tends to be often linked with art (in its broad sense).”¹ Creativity might seem to resemble any other artistic quality, something people lack or possess as much as a matter of genetics as anything else. And yet, like other artistic qualities (observation, hand-eye coordination, vocabulary, or writing skills), creativity may be teachable—or at least, whatever quantity one has as a matter of natural endowment might be enhanced with the right training.² On the theory that both creativity and creative thinking can be enhanced with some training and work, this essay will use the terms interchangeably.

The focus of this chapter will be on some methods for teaching and practicing creativity. I discuss the technique most commonly taught in negotiation courses as well as some newer, perhaps more obscure methods. This chapter closes with some questions about the applicability of “creative thinking” to the field of negotiation.

Beyond Brainstorming

Most teachers and trainers of interest-based negotiation will spend some time teaching creative thinking. Following the template set forth in *Getting to Yes*, they will encourage their students to “brainstorm.” Brainstorming is a somewhat formalized process in which participants work together to generate ideas. I say that it is formalized because it proceeds according to two important ground rules: participants agree not to evaluate the ideas while they are brainstorming, and they agree not to take “ownership” of the ideas. They strive to generate options and put them

on the table, no matter how wacky or far-fetched they may seem. The “no evaluation” rule encourages participants to suspend their natural urge to criticize, edit, or censor the ideas. Evaluation can come later, but the notion here is that solutions will flow more easily if people are not assessing them even as they articulate them. The “no ownership” rule also facilitates innovation because participants are encouraged to feel free to propose an idea or solution without endorsing it—no one can later attribute the idea to the person who proposed it, or try to hold it against that person. People can therefore propose ideas that might actually disadvantage them and benefit their counterparts without conceding that they would actually agree to such proposals in the final analysis.³ The ground rules for brainstorming constrain the natural inclination to criticize, so that participants are free to imagine, envision, and play with ideas, even though these processes come less easily to them.

Why is brainstorming so popular, both in practice and in negotiation training? Perhaps the answer lies not so much in what it activates, but in what it disables. What I mean is that it may be easier to teach people what *not* to do—rather than what to do affirmatively—in order to enhance their creative thinking. We may not know much about how to unleash new sources of creativity for negotiators, but we’re pretty sure about some things that impede creative thinking. Theory and practice suggest that creative thinking is difficult when people jump to conclusions, close off discussion, or seize upon an answer prematurely. Indeed, the very heuristics that make decision-making possible—those pathways that permit people to make positive and sometimes normative judgments [Korobkin & Guthrie, *Heuristics*]⁴—can lead people astray. One of the ways they may be led astray is that the heuristic prompts them to decide too quickly what something is or should be. Once judgment has occurred, it is tough to justify the expenditure of additional energy that creative thinking would require. Creativity could be considered the “anti-heuristic”; it keeps multiple pathways of perception and decision-making open, even when people are tempted to choose a single, one-way route to a solution. If we do nothing else, we can attempt to delay this kind of judgment until negotiators have considered multiple options. Brainstorming provides the structure for this kind of delay.

But is brainstorming the only technique for enhancing creativity? The answer would seem to be an easy “no.” Psychologists and other specialists in creative thinking have much to teach us beyond brainstorming.⁴ In a *Clinical Law Review* article, Janet Weinstein and Linda Morton survey some of the literature on “creative thinking” and suggest “several specific techniques to encourage its inception.”⁵ Barry Nalebuff and Ian Ayres have similarly proposed specific techniques to facilitate creative problem-solving.⁶ This section will summarize these suggestions.

Wordplay

Once an issue or problem is articulated, it is possible to play with the words expressing that problem in order to improve understanding and sometimes to yield new solutions.

Shifting Emphasis

To take a fairly simple example, suppose that two neighbors are in a dispute because cigarette butts and other small pieces of trash, deposited by Mr. Smith in his own front yard, are blowing into Mr. Jones’s yard, and those that remain in Mr. Smith’s yard are detracting from the appearance of the neighborhood (at least as Mr. Jones sees it). Mr. Jones might ask himself (or a mediator at the neighborhood justice center), “How can I get Mr. Smith to stop littering in his yard?” Shifting

the emphasis in this sentence brings into focus various aspects of the problem and suggests possible solutions addressing those specific aspects. Consider the different meanings of the following sentences:

“How can *I* get Mr. Smith to stop littering in his yard?”

“How can I get *Mr. Smith* to stop littering in his yard?”

“How can I get Mr. Smith to stop *littering* in his yard?”

“How can I get Mr. Smith to stop littering in *his* yard?”

“How can I get Mr. Smith to stop littering in his *yard*?”

As the focus of the problem shifts, so too different potential solutions might emerge to address the problem as specifically articulated.⁷

Changing a Word

Sometimes changing a word in the sentence helps to reformulate the problem in a way that suggests new solutions. In the example above, Mr. Jones might change the phrase “littering in his yard” to something else, such as “neglecting his yard” or “hanging out in his yard.” It may be that something besides littering lies at the root of the problem, and a solution will be found, for example, not in stopping the littering, but in more regularized yard work.⁸

Deleting a Word

Through word play, parties can delete words or phrases to see whether broadening the statement of the problem more accurately or helpfully captures its essence. Mr. Jones might delete the phrase “Mr. Smith” from his formulation of the problem. He would ask not “How can I get Mr. Smith to stop littering in his yard?” but rather “How can I stop littering [more generally]?” and thereby discover that it is not just Mr. Smith’s yard, but the entire street, that is looking bad. Focusing on Mr. Smith as the source of the problem may be counterproductive; Mr. Jones might discover that he needs to organize all of the homeowners on his block to battle littering in order to make a difference. Deleting words sometimes spurs creativity by removing an overly restrictive focus on the issue or problem.⁹

Adding a New Word

A final form of word play that can spur creative thinking is sometimes called “random word association.”¹⁰ Through this process, participants choose a word randomly and then think of ways to associate it with the problem. Suppose Mr. Jones and Mr. Smith were given the word “work”¹¹ and asked how it might relate to their dispute. Here are some possible results:

Work (time, effort): Mr. Smith will try to work harder to keep his yard looking nice, and he’ll check Mr. Jones’s yard every Saturday to make sure there are no cigarette butts or other pieces of trash in it.

Work (being operational or functional): What the neighborhood needs is a sense of cohesion; Mr. Jones and Mr. Smith will organize a neighborhood beautification project to try to instill a sense of community among their neighbors.

Work (job): Because Mr. Smith’s odd working hours sometimes lead him to smoke on his front porch and chat with his friends or family late at night (after Mr. Jones has gone to bed), Mr. Smith will stay in the back of his house after 10 p.m., further from Mr. Jones’s bedroom window.

As the different meanings and resulting associations of “work” are explored by the parties, they discover new ways to solve their shared problem. Other seemingly unrelated words might trigger still more associations and more potential solutions.

Adding words can also be helpful if participants insert adjectives that narrow the problem so it appears more manageable. Mr. Jones might ask, “How can I get Mr. Smith to stop littering in his *front* yard?” Narrowing the problem from all of

Mr. Smith's property to the front yard might suggest agreements that could keep Mr. Smith's front yard looking nice but still permit him to use other parts of his property (such as a side or back yard) as he wishes. This approach to word play builds upon the insight that many creative solutions are incremental. The problem will not seem so daunting to the parties when it is narrowed, and they can address the larger issues step by step.¹²

These techniques of word play (especially random word association) are designed to "force the mind to 'jump across' its usual pathways (mental ruts), or make new connections between old pathways in order to create a new idea out of two seemingly disparate ideas."¹³ The exercises might feel mechanical to the parties at first, but if adopted with some energy and good faith, they could help the parties to enhance the creativity of their thinking.

Mind-Mapping/Word Clustering

Weinstein and Morton also describe a form of word association called "Word Clustering" or "Mind Mapping," in which participants write the problem out and then write down words that come to mind, randomly, as related to the problem. The words are written without any particular order all over a paper, and once that aspect is completed, lines are drawn connecting the words as connections come to mind.¹⁴

This technique, they explain, can help participants discover the inner pathways by which their brains are connecting aspects of the problem in hidden ways. These connections can then lead parties to creative ideas about the problem.¹⁵

De Bono's "Six Hats" Technique

Edward de Bono has proposed a technique he calls "Six Thinking Hats," in which six aspects of a problem are assessed independently. As problem-solvers symbolically don each of six differently colored hats, they focus on an aspect of the problem associated with each color: red for emotions, white for facts, yellow for positive aspects of the situation, green for future implications, black for critique, and blue for process.¹⁶ As Weinstein and Morton point out, the technique of isolating the black/critique hat may be especially important for lawyers, whose tendency to move quickly into a critical mode may prevent them from seeing other important aspects of a problem.¹⁷ If the black hat is worn at or near the end of the process, the Six Hats technique displays a characteristic shared by brainstorming: it delays critique and judgment until other approaches can be tried. And shutting down judgment may enable creativity, as suggested above. By forcing themselves to address separately the emotional, factual, and process issues at stake in a problem, parties may discover room for creative solutions. Creative solutions are sometimes found in the terms of a future relationship between the parties. Wearing the "green hat" may force participants to come to terms with a future they would rather ignore.

The prospect of changing hats, even (perhaps especially) if it is done symbolically, could make some participants uncomfortable. Negotiators and neutrals should bear in mind that age, sex, ethnicity and other cultural specifics may create dignitary interests for some participants that would be threatened or compromised by some techniques for boosting creative thought. Some people would feel embarrassed or humiliated if they were asked to engage in the theatrics required by some of these exercises. For others, the chance to pretend or play might be just the prod they need to open new avenues of thought. In a spirit of flexibility (surely a necessary condition for creativity), therefore, one should be thinking of ways to modify these techniques to fit other needs of the parties. For example, the Six

Hats technique could be transformed into a “Six Flip Charts” exercise using differently colored paper or markers to signal the different focus of each inquiry

Atlas of Approaches

Another technique for stimulating creative ideas about a problem from a variety of perspectives is called the “Atlas of Approaches.” Roger Fisher, Elizabeth Kopelman and Andrea Kupfer Schneider propose this approach in *Beyond Machiavelli*, their book on international negotiation.¹⁸ Using the Atlas of Approaches technique, participants adopt the perspectives of professionals from a variety of fields. By asking themselves, for example, “what would a journalist do?”, “what would an economist do?”, “how would a psychologist view this?”, and so on, negotiators are able to form a more interdisciplinary view of their problem. With this more complete picture of the issues and potential outcomes, they might be able to connect disciplines in ways that give rise to creative solutions.

Visualization

When parties use the visualization technique, they take time to imagine the situation they desire, one in which their problem is solved. What do they see? What specific conditions exist, and how might each of those conditions be achieved? Weinstein and Morton suggest that parties can engage in visualization simply by closing their eyes and thinking about the problem in terms that are visual rather than abstract.¹⁹ Another approach is to “look at the problem from above, and see things otherwise invisible.”²⁰ The goal is to deploy a variety of the brain’s cognitive pathways (verbal, visual, spatial & abstract), the better to make connections that give rise to creative solutions.

“WWCD”: What Would Croesus Do?

This process requires a participant to take the perspective of an unconstrained actor. What solutions suggest themselves if we assume no limit to available money, time, talent, technology, or effort? Nalebuff and Ayres explain: “Croesus (rhymes with Jesus) was the supremely rich king of Lydia (modern Turkey), reigning from 560 to 546 B.C. His wealth came from mining gold.... His lavish gifts and sacrifices made his name synonymous with wealth. Even today we say ‘rich as Croesus.’”²¹ In some ways, one could think of the WWCD method as a more specific application of brainstorming. As the proponents of brainstorming are quick to point out, creativity and the free flow of ideas can be impeded by criticism or assessment. WWCD takes off the table any assessment based on constraints—financial, technological, etc. If we assume that we can afford and operationalize any solution we can come up with, what might we discover?

A second phase of this approach requires participants to think about the extent to which their unconstrained solution might be modified to make it workable given the existing constraints.²²

“Feel My Pain”

Sometimes people find creative solutions by focusing sharply on the specific sorts of harm caused by the problem. When one person’s decision-making has negative spillover effects on others, economists say that the person’s decision or activity is creating “negative externalities.”²³ Nalebuff and Ayres argue that “there can be great payoffs to asking whether you’re feeling other people’s pain,” because “[i]gnoring others’ interests leads to inefficient decisions.”²⁴ Solutions to this call for the parties to design “incentives so that all parties more fully feel the impacts that their decisions have on each other.”²⁵

Flipping or Reversal

With this technique, one asks whether flipping or reversing a given situation will work. As Edward de Bono explains,

In the reversal method, one takes things as they are and then turns them round, inside out, upside down, back to front. Then one sees what happens ... one is not looking for the right answer but for a different arrangement of information which will provoke a different way of looking at the situation.²⁶

Chris Honeyman sometimes uses this technique in his work as a neutral when he asks the parties to put forward some really *bad* ideas for resolving the conflict.²⁷ When people offer ideas in response to a call for “bad” ideas, they may free themselves to offer the ideas they partially or secretly support; again, as in brainstorming, they disclaim ownership of the ideas. It is also possible that the instruction to offer bad ideas stimulates creative thinking because it can seem *funny* to people. Humor is a good stimulant for creativity.²⁸

Chris Honeyman's theory is that bad ideas are easy to come by (they can often be found in abundance), and in many bad ideas there resides the kernel of a good idea. Framing them as “bad” ideas effects a sort of reversal or flipping; in de Bono's words, the participants produce a “different arrangement of information.”²⁹ Carrie Menkel-Meadow suggests that negotiators or parties to mediation use another form of reversal when they engage in “perspective-taking” or “role-reversal” exercises.³⁰

Most conflicts are multidimensional, giving rise to multiple sites at which elements could be reversed. Once the parties have broken down the situation into component parts, they can try reversing or flipping some elements to see whether this yields superior solutions.

Idea Arbitrage

With idea arbitrage, parties see an existing solution in one context and ask themselves where else it might work.³¹ A great example of this from the field of consumer products design is the electric toothbrush with rotating bristles. Nalebuff and Ayres point out that this terrific invention actually grew out of a much more trivial discovery—the rotating lollipop!³² The inventors of the lollipop knew they had a good thing, so they looked for new places to put it to use. Similar stories can be told about Velcro or polycarbonate wheels.³³ This building upon prior discovery is the root of creativity in art and science.³⁴ With idea arbitrage, the creativity stems from solutions—that is, expanding the problems to which an existing solution may be applied, rather than from a focus on the problems themselves. This approach assumes that there are solutions in search of problems, rather than the other way around.

Toys

A final technique for stimulating creativity would be a no-brainer for anyone under 16 (and for some of us who are considerably older than that): Toys! One former colleague of mine used to bring a Nerf basketball hoop to class occasionally to permit students to take a shot after a particularly insightful answer. I've allowed students to earn extra credit in a professional responsibility course by scripting and performing skits (or “role plays,” to use a more methodologically sober term). The students sometimes use costumes and props. Often amusing, these additional objects also seem to stimulate creative thinking in the audience as well as the performers.

Professor Barry Orton uses “Nerf weaponry” when facilitating negotiation of complex telecommunications disputes. He argues that the toys give people a

harmless and humorous way to blow off steam and sometimes introduce an element of levity into tense situations.³⁵ At the conference giving rise to a Marquette Law Review symposium, Professor Andrea Schneider gave each participant a souvenir: a soft foam cube emblazoned with Marquette's logo and the motto "Think Outside the Box." These cubes became creativity-enhancing toys during discussions, as Andrea (and sometimes other participants) would toss them at people who made particularly wacky, off-the-wall, or obnoxious comments. As instruments of mock discipline, the cubes actually lightened the mood and became a kind of trophy (anyone who could say something funny or outrageous enough to deserve a cube toss was raising the creativity bar for everyone else).³⁶ At a conference designed to stimulate creative, collaborative discussions, the cubes were a fun and effective tool—made all the more so by the spontaneity of Professor Schneider's first toss.

Creative Thinking in Negotiation

I'll close with a few questions about creative thinking. First, can the techniques I've summarized here all find specific application in negotiation? Surely some of them will be less useful than others. WWCD, for example, may have limited use in most conflict situations. Suspending critique during brainstorming is one thing, but many negotiators will be reluctant to assume away *all* constraints. Or they may fear that WWCD discussions will be a waste of time, because once the constraints are again taken into account, the solution will go away entirely.

Idea Arbitrage might also seem to have limited applicability to most negotiations, because the very genesis of the negotiation is a *problem* to be solved, not a solution in search of a problem. On the other hand, Idea Arbitrage may be helpful as a persuasive tool—one that supports creativity. Suppose that a negotiator has come up with a creative solution to a problem, and knows that the solution has been used successfully in another context. Presenting the new, creative solution as an old idea rather than a new one may make it more acceptable to the other side. Lawyers, as we know, love precedent. Idea Arbitrage gives a creative solution a kind of pedigree or set of credentials it might otherwise lack if presented as a brand new idea. Perhaps persuasion is part of creativity—we need tools not only to generate creative thinking, but also to make the results of creative thinking more acceptable to our fellow problem-solvers. [Guthrie, *Compliance*] Thus, all of these techniques belong in the negotiator's toolbox, even if some will have more specialized applicability.

It also seems clear that the nature of the negotiation will strongly determine the kinds of creativity-enhancing techniques that are useful. Not all ideas will work as well in Dispute Settlement Negotiation as they do in Deal Making Negotiation.³⁷ Our field needs more work on creative thinking specific to the negotiation of disputes in order to improve the representation that clients eventually receive.

This chapter has collected just a few methods that could take negotiators beyond brainstorming when they want to inspire creative thinking. Often moments of inspiration come and go in a flash; we may retain the substantive result of our creativity, but we give little thought to the process—the chain of insights—generating our ideas. The challenge facing negotiation teachers and practitioners is to capture those moments and then analyze the steps (or to use less linear metaphors, the atmosphere or web of connections) that made the creative moments possible. Meeting this challenge requires attention to process as well as product in negotiation. But that is a focus both familiar and customary to negotiation theorists.

Endnotes

- ¹ Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLINICAL LAW REVIEW 835, 838 (2003).
- ² See generally Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education*, 6 HARVARD NEGOTIATION LAW REVIEW 97, 122 (2001).
- ³ For material on brainstorming, see ROGER FISHER, ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 56-62 (2d ed. 1991); ROBERT MNOOKIN, ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 37-39 (2000).
- ⁴ On the other hand, empirical research on enhancing creativity is sparse, and much of what is said about it is probably speculative. Raymond Nickerson, *Enhancing Creativity*, in HANDBOOK OF CREATIVITY 392 (Robert J. Sternberg ed. 1999).
- ⁵ Weinstein & Morton, *supra* note 1, at 837.
- ⁶ BARRY NALEBUFF & IAN AYRES, WHY NOT? HOW TO USE EVERYDAY INGENUITY TO SOLVE PROBLEMS BIG AND SMALL (2003).
- ⁷ See *id.* at 854.
- ⁸ *Id.*
- ⁹ Weinstein & Morton, *supra* note 1, at 854.
- ¹⁰ *Id.* at 855. See also, PAUL E. PLSEK, CREATIVITY, INNOVATION AND QUALITY 42, 247-67 (1997).
- ¹¹ I actually chose this word semi-randomly by opening a book, closing my eyes, and pointing to the page. My finger landed on the word "work."
- ¹² *Supra* note 1, at 855. See also Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMPLE LAW REVIEW 785, 798 (1999) (noting the "incremental and recursive" nature of some creativity or invention).
- ¹³ Weinstein & Morton, *supra* note 1, at 856.
- ¹⁴ *Id.* at 857-58.
- ¹⁵ *Id.* See also TONY BUZAN, THE MIND MAP (1996); STEVEN EFFERT, CROSS-TRAIN YOUR BRAIN 75 (1999).
- ¹⁶ EDWARD DE BONO, SIX THINKING HATS (1999).
- ¹⁷ Weinstein & Morton, *supra* note 1, at 856-57. This is also consistent with the "no evaluation" ground rule in "brainstorming."
- ¹⁸ ROGER FISHER, ET AL., BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT 67 (1996).
- ¹⁹ Weinstein & Morton, *supra* note 1, at 859.
- ²⁰ *Id.*
- ²¹ Nalebuff & Ayres, *supra* note 6, at 16. A more modern form of this question might be, "What Would Bill Gates Do?"
- ²² *Id.* at 46.
- ²³ RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (6th ed. 2002).
- ²⁴ NALEBUFF & AYRES, *supra* note 6, at 29.
- ²⁵ *Id.*
- ²⁶ EDWARD DE BONO, LATERAL THINKING (1977). See also NALEBUFF & AYRES, *supra* note 6, at 118.
- ²⁷ Telephone conversation with Christopher Honeyman, January 13, 2004.
- ²⁸ Clark Freshman, et al., *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know about How Mood Relates to Successful Negotiation*, 2002 JOURNAL ON DISPUTE RESOLUTION 1 (2002) ("many studies of psychology and business school students show those in even mildly better moods—after smelling a pleasant scent, or watching a funny five minute video—do better at negotiation"); Roderick Kramer, et al., *Self-enhancement Biases and Negotiator Judgment: Effects of Self-Esteem and Mood*, 56 ORGANIZATION BEHAVIOR & HUMAN DECISION PROCESSES 110 (1993); Alice Isen, et al., *The Influent of Affect on Clinical Problem Solving*, 11 MEDICAL DECISION MAKING 221 (1991).
- ²⁹ De Bono, *supra* note 16.
- ³⁰ Menkel-Meadow, *supra* note 2, at 122.
- ³¹ NALEBUFF & AYRES, *supra* note 6, at 29.
- ³² See *id.* at 31-33 for a great retelling of the story, complete with pictures from the patent application for the lollipop.
- ³³ *Id.* at 30-31.
- ³⁴ Nickerson, *supra* note 4, at 393.
- ³⁵ Barry Orton, "Another Alternative Dispute Resolution Tool: Nerf Weaponry", presentation at Wisconsin Association of Mediators "Emerging Issues in Mediation" Conference, Madison, Wisconsin, November 7, 2003.
- ³⁶ Clearly, using toys can run into the same cultural/dignitary issues that arise with other forms of dramatic play. See *id.* Part I.C. In some cases the levity would be perceived as disrespect or lack of rigor. Barry Orton argues, however, that these forms of play may be modified for more serious settings. He cites a negotiation in which members of his team carried pens that also served as mini Nerf rocket launchers. By the end of the negotiation, his oh-so-serious counterparts on the other side of the table were asking to trade their matching silver pens for some rocket launchers; Orton declined the silver pens but purchased a set of the launcher-pens for his adversaries. The gift generated a great deal of good will. Orton, *supra* note 35.
- ³⁷ Frank E. Sander & Jeffrey Z. Rubin, *The Janus Quality of Negotiations: Dealmaking and Dispute Settlement*, 4 NEGOTIATION LAW JOURNAL 109 (1988).