

Kluwer Mediation Blog

The Soft Touch: The Village Elder

Jeffrey Krivis (First Mediation Corporation) · Thursday, September 26th, 2013

First, a confession. Next, a suggestion.

At the beginning of every mediation session, I am not sure which hat I will be wearing. Will it be the role of the poker player who is dealing for dollars? The priest who listens to his parishioners' penitence? The bartender who tells stories? The judge who tells the parties what to do? The philosopher who shares thoughts about the way of the world? Some days I wear all those hats. Other days I might wear just one.

As my experience over many years has developed, there is one hat that I find myself wearing more often, the Village Elder.

The village elder is considered the highest ranking and most respectable leader in the community. The elder represents the community in governing and decision-making. While different cultures view the village elder in unique ways, one thing is for certain, the elder is revered and provides direction and order for the members of the society.

Generally speaking, the elder is a more senior member of society, often advanced in age and in rank. In religious institutions, the elder is often a teacher or governing officer. In advanced societies like the United States or Europe, the elder is often a seasoned political leader or statesman.

It comes as no surprise that in the context of high stakes commercial litigation, the parties often seek out a person who is accustomed to wearing the hat of the village elder to help mediate their cases. While this is but one of many roles of the mediator, it can be the most prominent for a number of reasons.

Consider the consistent trait of those in our society who might be recognized in the distinguished category of village elder: Franklin Delano Roosevelt – he led us out of the Great Depression and provided leadership and direction in social programs that stabilized society. Ronald Reagan – he demonstrated that democracy was a more stable and preferred approach than socialism. Rosa Parks – she stood tall against racial discrimination and opened the door for many to feel pride in themselves. Benjamin Franklin, the true Renaissance man – a diplomat, inventor, businessman and editor of the Declaration of Independence. The list could go on indefinitely. That trait is leadership.

Great leaders provide **direction** to other people, especially when people don't know which way to go and they don't have a clear sense of the future. Leadership is the skill of giving other people

direction so that they can start moving in a particular way.

In this regard, there are three ways a mediator can provide direction:

(1) Show people where the *opportunity* is.

At any given time in the course of a litigated case, there is a financial opportunity for resolution. That opportunity is defined and condensed in a mediation format. A good leader will always make sure the parties know exactly what they are giving up by not settling and what could be obtained by settling.

(2) Show people how to avoid *dangers*.

Dangers are in essence the minefields that disrupt settlement and push people in the wrong direction. Simple examples might include discouraging low ball offers or demands that have no basis in reality; keeping the perpetrator in a sexual harassment case away from the victim; coaching the parties on how to anticipate a bad response from their adversary.

(3) Show how *progress* can actually be achieved.

In addition to the usual exchange of information in a mediation, each sequence must involve some type of movement toward settlement. That might be an incremental offer or some other concession that keeps things forward moving.

Great leaders also provide a sense of **certainty** to other people. People tend to feel isolated, alone and helpless. This sense of certainty gives them confidence to actually go in the direction they want to go. Here are the obvious ways a mediator provides certainty to the parties:

(1) By providing *encouragement*.

When Barack Obama ran for president in 2008, his campaign was styled on theme of hope for the future. Everything in the campaign was upbeat and made the electorate (at least enough for him to win) go to the polls and vote. This effort to rally people in a direction is also common in sports of all kinds, especially college sports. Rooting for your alma mater is a way of encouraging your team to stay in the game until the final whistle is blown, despite the odds stacked against the team.

(2) Provide *support*.

It's exhausting to negotiate, particularly if the negotiation takes all day. People get worn out and need to be refreshed on many different levels.

Finally, great leaders provide **capabilities** to other people. This involves new tools for problem solving and the ability to be creative. It's like the old saying 'Give them a fish and they'll eat for a day; teach them how to fish and they will eat for a lifetime'. Here are a couple of ways these capabilities are provided:

(1) New ways to think about the problem; new *tools* for problem solving.

There is a rarely a moment in the process of a mediation where the parties are not at an impasse or fork in the road. A village elder might have been down that road once or twice and often has creative ideas about how to navigate. The ideas might be as simple as a mere suggestion that the two principal litigators find their way to the coffee machine at the same opportune time, or as complex as coming up with an outline of terms to manage a class action settlement.

(2) Give them a *structure* for dealing with the future. 'If this happens ...'.

The 'what if' scenario is priceless to the mediator and the parties. It opens the door to options for

moving the negotiation ball forward without a party formally giving up any ground, and it might reveal to the mediator a path toward closure.

(3) Give them whole new *systems* to operate in.

Depending on the case, if there is an ongoing relationship involved such as a current employee who has sued for harassment, the village elder can suggest different paradigms for the future. If there is no ongoing relationship, a system that has the appearance of a negotiation game board might be needed to move the pieces across the finish line.

There are moments in a mediation that call for the mediator to wear the hat of the rabbi, priest or even bartender. Other times the mediator might serve as the judge or messenger of information. But all moments in a mediation call for the mediator to have the soft touch of the village elder.


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