Effective Mediation Advocacy

Kluwer Mediation Blog
November 23, 2013
Rick Weiler (Weiler ADR Inc.)

What constitutes effective mediation advocacy? Litigation lawyers in an increasing number of jurisdictions around the world understand that mediation is becoming or has become the primary dispute resolution forum and therefore naturally are interested in acquiring and enhancing the knowledge and skills necessary to effectively represent their clients in the mediation process.

Earlier this year the International Mediation Institute addressed this issue when it released its “IMI Mediation Advocacy Competency Criteria”.

Now, Osgoode Hall Law School in Toronto, Canada is presenting what promises to be a very interesting and dynamic two-day course on Mediation Advocacy, December 10th and 11th. The course program can be seen here and it will be noted that not only has every effort been made to gather leading practitioners of the Ontario plaintiff and defense bar (not to mention, modestly, some of the most in-demand mediators in this province) but that the course design incorporates a dynamic collection of teaching techniques including video demonstrations, group discussions and role-plays.

Your faithful blogger has been asked to participate in a panel discussion on Advocacy at the Mediation. The panel, consisting of a plaintiff counsel, defense counsel and mediator (also moderated by a mediator) has been asked to offer opinions on a series of questions. This is where I’m asking for your assistance.

Below you will see the actual questions the panel will be addressing. I’m asking you to offer your own thoughts on all or any of these questions in a line or two. I will then inject some of your comments into the panel discussion – with attribution (unless you note that you’d prefer me not to name you). So, without further ado, here are the questions. Thanks in advance for your responses:

1. Is there a tactical role for the apology in mediation?
   - Have you offered an apology, or instructed your client to offer an apology, at mediation? What are the tactical considerations?
   - How do you handle an apology?
   - How do you handle an apology from the other side?
   - How do you handle an apology as a tactical move?

2. How will your offer/response style likely impact on your credibility with your client, with opposing counsel, with the opposing counsel’s client and with the mediator?
   - How does your offer/response style impact on your credibility?
   - How does the opposing party’s offer/response style impact on your credibility?
   - How does the mediator’s offer/response style impact on your credibility?

3. Playing tough/scare tactics/fixing the file for settlement
   - What is the right response to “playing tough/scare tactics/fixing the file for settlement”?
   - How do you fix the file for settlement?
   - How do you handle an opposing counsel who is playing tough?

4. What does “final offer” really mean?
   - How do you define “final offer”?
   - How do you handle an opposing counsel who is not making a final offer?
   - How do you handle an opposing counsel who is making a final offer?

5. Using mediation for ulterior purposes
   - What are ulterior purposes?
   - How do you handle ulterior purposes?
   - How do you handle an opposing counsel who is using mediation for ulterior purposes?

6. Dealing with troublesome situations, such as when plaintiff’s counsel seeks to insulate the client from the mediator.
   - How do you handle a client who is not communicating with the mediator?
   - How do you handle a client who is not communicating with their counsel?
   - How do you handle a client who is not communicating with you?

Dear reader, if you have any other comments don’t hesitate to add them below.