

Mediation Navigation Beacons

Kluwer Mediation Blog
October 10, 2018

Rick Weiler (Weiler ADR Inc.)

Please refer to this post as: Rick Weiler, 'Mediation Navigation Beacons', Kluwer Mediation Blog, October 10 2018, <http://mediationblog.kluwerarbitration.com/2018/10/10/mediation-navigation-beacons/>



You're mediating an insurance matter. The angry and cynical male plaintiff wails, "They're insulting me with this offer! But, what else should I expect from a f*****g insurance company!?" The "seen it all before" plaintiff's lawyer wearily closes her laptop. "That's it!", she says. "We're outta here unless you go back and get us a real offer in the next five minutes".

In the other room you find the insurance representative and her lawyer hunched over a laptop cackling gleefully as they replay their as yet undisclosed surveillance video of the plaintiff shopping at Walmart, reaching up to grab a heavy item on a top shelf - something he's sworn under oath he is incapable of doing.

You decide to take a break in the mediator's lounge - identified by the "MENS" sign where I usually mediate. You're sinking and wondering why it was you chose this line of work in the first place.

How do you avoid crashing into the rocks of impasse? Where are the shiny beacons that mediators can look to when they're floundering in the shoals of standoff?

Nearly 30 years of mediation practice have taught me the importance of certain core principles that I come back to in every case I mediate. These are my mediator's navigation beacons. I know every experienced mediator has their own. These are the ones I turn to. These are the ones I teach to my law students. Let me say a brief word about each of them.

Preparation

Mediation requires us to prepare deeply; becoming familiar with the facts and applicable law, developing our strategy, checking our tool kit of tactics for each and every case.

One Step at a Time

But even with all the preparation in the world we know mediation to be an intensely dynamic process. The winds change. The calm waters turn into a churning cauldron in an instant. That's when I chant to myself the mantra, "one step at a time".

Good Decisions, All Things Considered

As a young mediator I counted my successes the way I thought everyone did: settlement rates. I now believe that a successful mediation is one in which everyone involved has the opportunity to make a good decision, all things considered.

Yes, and....

Lawyers and their clients tend to see their disputes in "either, or" terms - black or white, right or wrong, win or lose. We help parties to see aspects of their dispute in "yes, and...." terms leading to a more collaborative, less competitive approach. We point out that rarely in mediation does one party argue the other to submission. We counsel what we believe to be a more effective approach that says, "Yes, you have strengths to your case **and**, as you know, there are weaknesses as well. While we may not reach agreement on those points today let's put them aside to see if we can work together to reach an agreement that will acceptably address everyone's interests".

Dignity and Respect

We model interpersonal behaviours based on our recognition that each participant in the process is a human being, craving and deserving dignity and respect. We hope others will notice and learn.

Genuine Curiosity

All of us as newbie mediators are taught, "when in doubt, ask a question". I now know that when those questions are posed with an attitude of **genuine curiosity** the mediation process can really catch fire - in a good way.

Focus on Interests

We refocus parties on their own interests. Mediated negotiations conducted on the basis of competitive positions and round by round haggling disclose an abject poverty when compared to what can happen when negotiators spotlight the interests of the other party and then effectively and authentically communicate their own.

High Expectations

My experience in the mediation process (and, frankly, life beyond) has been that people and events rise or fall to meet your expectations. We must model that sense of high expectations in every interaction during the mediation.

These beacons guide me as I take another deep breath, exit the "lounge" and head back into the fray. I share them with the hope that other readers of this blog will share their own beacons with readers of this Blog.