

# Kluwer Mediation Blog

## One Step at a Time – An Important Principle in Commercial Mediation

Rick Weiler (Weiler ADR Inc.) · Monday, October 22nd, 2012

Recently, during a lull in the action in a tort mediation, I was drawn aside by an insurance representative I see frequently. He had concerns about my “style” as a mediator. “Every mediation it’s the same thing”, he said. “It’s almost like everyone knows where the case is going to settle in advance so why can’t we just get to it? Why do we have to do this tedious dance lasting a full day?” He was bored. I had some sympathy for his position. I sometimes have the feeling at the start of a mediation that I’m about to present the same play for the umpteenth time. The old joke attributed to Elizabeth Taylor’s fifth husband crosses my mind: *“I know what I’m supposed to do, but how do I make it interesting?”*

Of course, the truth of mediation is that you never quite know what is going to happen next. This has kept me energetic about conducting mediations for many years (and I hope many years to come). But, more than this, the success of the mediation process very much relies on a one-step-at-a-time approach. It can’t be rushed in most cases.

One of the reasons this is so harkens back to the so-called “[five stages of grief](#)” popularized in Elisabeth Kübler-Ross’ 1969 book, *On Death and Dying*.

As originally conceived by Professor Kübler-Ross the five stage model was designed to help understand how individuals contend with the knowledge of their impending death. It was later popularized as a standard theory for understanding how people cope with grief. That later application of the model has largely been discredited as a result of significant research conducted in the last decade. For example, see [here](#) and [here](#).

Still, as a mediator, I routinely witness this five-stage model unfolding in many insurance mediations. Here’s how it works. At the start of the mediation each side is in denial. They can’t believe they are really involved in this dispute and they believe that the ultimate resolution will be at or close to their position. This stage plays out in the mediation briefs and the opening statements in joint session and continues into the opening offers from caucus. The next stage is anger and is witnessed by me as I deliver the first offers to each caucus room. I often say that one of the interesting aspects of my job is to observe the righteous indignation in BOTH rooms.

The third stage is bargaining and this is what we see in most mediations during the middle part of the day, characterized by the back and forth as parties edge their way to apparent points of resistance. The fourth stage, despair, sets in as each side realizes that the trajectory of their

negotiations will leave them with a very large gap and it seems unlikely that resolution will be found.

This, of course, is one of the main reasons the mediator is there: to help move the parties beyond this sense of despair to a point of acceptance (the final stage).

Generally mediators do this by first testing the apparent points of resistance. There are a variety of mediator tools for this but perhaps the most effective in insurance mediations is the Mediator's "Double-blind" proposal. The "Double-blind" proposal is a mediator strategy where the mediator writes out a full settlement proposal and gives a copy to each side asking each side to simply indicate "Yes" or "No" with the assurance that "Yes" answers will be kept confidential unless both sides have said "Yes" in which case the matter is resolved on the proposed terms. A more detailed discussion can be seen read at Rodney Max's excellent article, [Mediator's Proposal](#)

If this doesn't resolve the case it usually allows the mediator to form a much better idea what the "true" points of resistance might be. In a very careful manner following a failed mediator "double-blind" proposal the mediator can usually allow both sides to get an accurate sense of the size of the remaining gap.

At this point I work in caucus with both sides, encouraging them to focus on the question that has been pending throughout the mediation: "all things considered, is the remaining gap worth the fight from this point forward?" In successful mediations this is where despair turns to acceptance. Parties, having been through the whole process, one step at a time, accept the situation in which they find themselves; accept the responsibility to reflect on the "all things considered" question and, most times in mediation, accept the opportunity to resolve the case.

I discussed all of this with my bored insurance representative who, I'd like to think, had a different appreciation of the dynamics of the mediation process when the conversation concluded. Still, this conversation is causing me to reflect further on the process satisfaction of the defendants in mediation. Keeping the process fresh and interesting seems to me a legitimate challenge to a mediator so I'll have to see what I can do on that front. Stay tuned.

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