

Kluwer Mediation Blog

Reflections on not 'Getting to Yes'

Rosemary Howell (University of New South Wales) · Wednesday, December 22nd, 2021



Reading Alan Limbury's post last week on [the value of the partisan](#) challenged my thinking. Like all good challenges it provoked scrutiny of what I do as a mediator and where I consider I add value. As Alan's partner in life and work it was particularly valuable to debrief his experience with him in greater depth.

The scrutiny was fruitful.

It prompted me to revisit some firmly held beliefs about the role of the mediator and the constraints I consciously impose on the role. In my mind – and front of mind – there is a line I choose not to cross. It is the line that separates the independent, impartial and unprejudiced from the partisan. I am aware that I bring my own values, prejudices and life experience to each new mediation but it is my aspiration that these remain contained within my boundaries and have no influence on the parties.

I value the ideas proposed by [Professor John Wade](#) of Bond University in Australia. His exploration of evaluative mediation suggests to me that there is a continuum of mediator behaviours and that each of us has decided (or, like me, is continually reviewing) where our mediation practice sits on that continuum.

Revisiting the 'line'

When I investigate the line between what I do and what I am not prepared to do I also must acknowledge that I am motivated to be a catalyst to get the parties to 'yes'. I feel some lingering sense of disappointment if they don't get there on my watch and I am hypervigilant to ensure I don't do anything to sabotage their opportunities for an agreement.

I also regularly hear or read colleagues talking about passing personal goals like "over 300

version of BATNA to appear in each party's opening address. Often the lawyers will deliver the legal BATNA and, if it is strong, make serious threats. However **parties** own the BATNA, not the lawyers. Mediators can help them reflect on the various ways they might present it and offer a safe place to practise. Since our BATNA is intended as a tool to maximise our power at the table, it is appropriate that parties themselves have a role in the BATNA conversation.

3. **Keep alternatives live** (in a situation-specific way) during the mediation.

A BATNA is not fixed. There are circumstances during a mediation where a combination of events can operate to provide an unexpected opportunity for a party (legitimately) to strengthen their BATNA or (legitimately) to worsen the other party's. There is value in encouraging the parties to revisit their BATNA privately at points during the mediation, to reflect on any movement and consider whether and how to draw on it in open session.

4. **Moving the line does not need to move the role of the mediator out of the impartial and independent space**

This is still a work in progress for me however it seems possible to support each party in robust preparation without promoting a particular course of action or revealing a view about tactics or outcome. We mediators can be independent and even-handed in supporting each party to prepare their alternatives and choose and constantly refine their BATNA.

As this challenging year draws to a close I anticipate I will continue this reflection and the conversation with Alan which triggered all this.

To be continued.....

To make sure you do not miss out on regular updates from the Kluwer Mediation Blog, please [subscribe here](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



This entry was posted on Wednesday, December 22nd, 2021 at 9:00 am and is filed under [Clients](#), [Commercial Mediation](#), [Creativity](#), [Decision making](#), [Developing the Field](#), [Evaluative Mediation](#), [Future of mediation](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.