

Following the Scout Law in Mediation

By
David I. Karp

I am a mediator. I help people in conflict to resolve their differences, usually in negotiated settlements of real estate and business disputes, often so that they can avoid further litigation and/or trial. I am also the father of an Eagle Scout and a committed volunteer leader in Scouting. Except for family, which comes first, and business second, I think about Scouting a lot (compulsively according to my wife). Anyway, I believe in Scouting's code of ethical conduct – the Scout Law. I follow it in my daily life. It forms a framework for me as a mediator. Here's how.

A mediator is:

Trustworthy. The first goal of a mediator is to create trust. Generally people in conflict do not know whom to trust. They may or may not trust their attorneys completely. They must trust their mediator if a successful mediation is to occur. Wise mediation trainers teach that the golden rule in mediation is “Do no harm.” In my view, trust comes from affirmatively and reliably acting so as to harm no one in the process.

Loyal. In mediation, I spend most of my time in private sessions with each side (lawyer and client). In these private caucuses, attorneys and parties give me confidential information, and with trust, communicate very private thoughts and feelings. I promise never to reveal something, given to me privately and in confidence, without permission to do so. Loyalty, like trust, relates among other things to adhering diligently to one's pledge of confidentiality.

Helpful. I believe I am most helpful when I can get the parties and their attorneys to think and act creatively. Sometimes this requires giving some hints in the negotiation process. Sometimes, relating an effective technique or offering a solution that worked in a prior mediation can move the mediation to a positive conclusion.

Friendly. People like to be liked. So do mediators. Being liked comes from people forming positive connections with one another. Sometimes, seemingly innocuous chit-chat, at the outset, during breaks, or even during private caucus, can create sufficient affiliation and friendliness to help move the process along. Offering food or rest breaks can help too.

Courteous. As the BSA says, politeness and good manners make it easier for people to get along together. For the most part, that is all that needs to be said. However, sometimes parties in conflict simply cannot get along together. Keeping them apart (i.e., not having a joint session with everyone in the room together) sometimes is a courtesy that will not go unappreciated.

Kind. To me, kindness in mediation equates to empathy. People in mediation are in considerable distress. Acts of kindness include listening actively, validating a person's

feelings and even offering facial tissues when the tears come. Considerable good can come from being gentle.

Obedient. Obedience in mediation to me means following the rules of ethics and good conscience. There are myriad ethical considerations for mediators, as for attorneys. Obedience is not doing absolutely everything an advocate tells the mediator to do, especially if it creates discomfort for the mediator; rather, obedience to the process is helping the advocate to understand other ways to achieve his or her goals. Mediators are the guardians of procedural fairness. Sometimes, obedience to the process requires withdrawal by the mediator if he or she perceives procedural unfairness, unethical conduct or irreconcilable conflicts of interest.

Cheerful. A mediator's job is to engender hope in the process, optimism for settlement if settlement is what the parties want, and satisfaction with the outcome. It is unrealistic to think that a mediator can make everyone happy, but if everyone is satisfied with and tolerates the negotiated settlement agreement at the end, the mediator has done his or her job well.

Thrifty. Being thrifty in mediation is understanding the time element involved. People do a lot of waiting in mediation and they get impatient. Pacing the mediation so as not to waste time ("time is money") is an attribute of a good mediator.

Brave. Bravery is about taking calculated risks in mediation, trying some new technique or following a new idea, without fearing the potential for failure if it does not work. Bravery also includes the ability to recognize that something did not work if it did not, to apologize if necessary and to move forward and try something else. Bravery is also about being diligent and persistent in cajoling and encouraging parties who become frustrated with their opponents or the process.

Clean. The Boy Scouts use this adjective to assert neatness in one's grooming and decency in one's outlook. Those are good ideals for mediators as well, as are staying away from drugs and alcohol in excess. But cleanliness goes farther than that for mediators. To me, this is more about such ideals as remaining pure or unsullied in the sense of remaining neutral and unbiased and not taking sides in the mediation, all as appropriate to being the Neutral in this dispute resolution process.

Reverent. I learned from Scouting to be faithful in my religious duties and to respect the beliefs of others. I see strong religious convictions among disputants often in mediation. Religious faith is often a core concern of disputants which governs what they will or will not do in mediation. Many people equate Faith with Justice, which is often the ultimate measure by which some people view the conflict and its resolution. I see the mediator's role in this to understand, appreciate, validate and point out the impact of a person's faith on his or her judgmental position in negotiation. It is something that will either be of value or an obstacle to resolution, but in either event must be respected.

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