NCRC WEST COAST RESOLUTION GROUP

THE IMPORTANCE OF CIVILITY IN ACHIEVING BEST RESULTS AT MEDIATION

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Whether you're a new lawyer or one with years of experience, never take a "bulldog" attitude into settlement discussions. Behaving respectfully and civilly in mediations (and in all negotiations) greatly enhances the chance of achieving successful resolution. Here's why:

Zealous Advocacy in the Legal System

The Anglo-American judicial system is fundamentally adversarial. Lawyers are ethically obligated to "zealously" represent their clients. The American Bar Association's Rules of Professional Conduct (Rule 1.3, Diligence) require lawyers to act with commitment, dedication, and zeal on their clients' behalf.

In theory, when both sides zealously present their cases, the trier of fact will be capable of seeing through the advocacy and finding the result that is "just." In practice, however, litigation "zeal" sometimes manifests as impatience, sarcasm, belittling, or even bullying. While such behaviors may be regrettably an all-too-common practice in litigation, they are counterproductive behaviors in negotiation. Respect, not hostility, leads to better results.

Business Negotiations as a Model

Seasoned businesspeople understand that heightened emotions cloud judgment and have little place in important negotiations. Proposals are evaluated through data, analysis, and logic. Information and perspectives are typically shared freely to persuade the other side of the soundness of a position. Each side seeks to know what the other side truly needs and wants, and, thereby, the basis for its proposals. There is no place for anger and vitriol.

Mediations (and other less formal legal negotiations) should be approached in the same way as any business negotiation. Fundamentally, negotiations of legal disputes are business negotiations. Both parties participate in the negotiations voluntarily, just like business negotiations. Both parties engage in negotiations with well-defined goals as to outcome, just like business negotiations. Both parties participate in the process with a desire to strike a deal, just like business negotiations. Neither party is ordered or compelled to agree with any of the other side's proposals, just like business negotiations. Objectivity sets the tone, and as noted above, there is no place for anger or vitriol.

Mediations and Legal Negotiations are Not a Search for "Justice"

Business negotiations focus on serving business objectives, not achieving some form of "justice." Fundamentally, legal negotiations, too, seek to address business (and, in some cases, personal) objectives, regardless of what is "just." For two reasons, it is a mistake to seek "justice" in mediation:

> **(1) "Justice" is a matter of perspective and opinion. Each party believes its construct of "justice" is the proper one. However, it is rare that settlement is ever reflective of either party's definition of "justice." To reach settlement, there must be compromise. Parties should enter the negotiation process targeting objectives that will be satisfactory to them, rather than pursuing some abstract perception of "justice." Seeking reasonable objectives is what businesspeople do, and legal negotiators should, too.**

> **(2) Within our judicial system, "justice" has a practical definition, rather than one found in a dictionary. As a practical matter, "justice" is what the trier of fact says it is. After a trial or arbitration, a party might feel it did not receive "justice," but, as a practical matter, those parties are wrong. By proceeding through trial or arbitration, parties deliver their fate to third parties and, in effect, acquiesce to the result being "just." Of course, there is no third party present to judge a mediation or legal negotiation, so "justice" cannot be achieved. What can be achieved is a sound business deal which includes cessation of expenses, termination of emotional anxiety associated with the litigation process, and elimination of litigation risk.**

Success in mediation requires coaxing the other side away from rigid notions of "justice" and toward pragmatic, businesslike solutions. This can be achieved only through reason, logic, and data—not through disrespect or hostility.

When participants feel attacked or belittled, they become defensive. Those under attack will either shut down or retaliate, and neither reaction is going to promote agreement. Civility keeps the focus on problem-solving rather than counterpunching and score-settling.

A Lawyer's Obligations in Negotiations

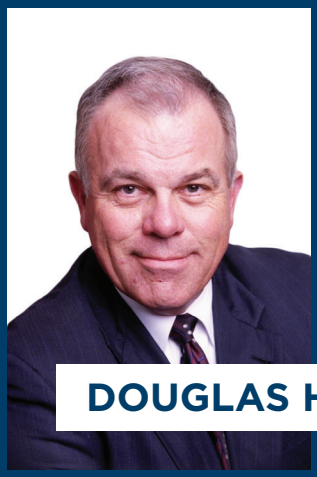
Whether a client is going to accept a negotiated proposal is, of course, up to the client. The lawyer's obligations to the client during those negotiations include:

(1) Using the negotiation process to cause the lawyer and the client to fully understand the other side's purported facts, opinions, and arguments. Indeed, once the negotiation is concluded (with or without agreement), both the lawyer and the client should be capable of forcefully and thoroughly arguing the other side's case, even if they do not agree with any of it. Decisions to settle or to continue with litigation are best made when in full command and understanding of the other side's factual allegations and arguments. Fundamentally, the first order of business is to make sure the client completely understands the other side's case.

(2) Staying engaged in the negotiation process until it becomes clear that the other side's last proposal is truly its best proposal. Regrettably, it is too common for lawyers to become frustrated with the negotiation process, then quit the process without getting the other side's best proposal. While the lawyer advises the client on the acceptability (or not) of a proposal, it is up to the client to make the final determination as to whether to accept. Therefore, the client is entitled to hear the other side's true last, best, and final proposal, rather than being pulled away from the process before the other side's best proposal has been offered. Showing contempt or disrespect toward the other side risks an artificially early termination of the negotiation, thus denying the client the opportunity to hear the other side's most compromised proposal.

Conclusion

As the proverb reminds us, "You can catch more flies with honey than with vinegar." Civility and respect are not signs of weakness; they are the most effective tools for achieving agreement in both business negotiations and in mediation. By setting aside courtroom combativeness and embracing respectful, well-prepared advocacy, lawyers and their clients maximize the chances of reaching a favorable resolution.



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Doug Barker has been active as a mediator for over 30 years. During the late 1990s, he trained to become a mediator and commenced his highly successful mediation practice. With time, that mediation practice grew until it became his exclusive professional area of practice. In addition to his background as a lawyer, arbitrator, and mediator, Mr. Barker possesses broad academic achievements and life experiences that enable him to understand and empathize with the parties and issues in mediation. To date, Mr. Barker has served as mediator in over 2,000 cases.

For more information or to schedule a case, please contact us at 619-238-7282