

LAWYERS IN NEGOTIATION – THE GOOD, THE BAD AND THE UGLY

For a mediator, a day in mediation is an enriching experience. It is a privilege to watch parties move from what at first blush, appeared to be an intractable dispute attended by a high level of conflict, to resolution at the mediation table. Everyday in mediation we witness a shift in parties' understanding of a dispute and in consequence their approach to it. We get to understand a little more about the complexities of the human psyche, what moves and shakes people, what pushes buttons and what has profound impact. Granted some of this may be less than obvious in a more traditional negotiation about "the money", but it is the subtext in any mediation.

It is also a privilege to observe some lawyers in negotiation; to note the breadth of strategies and soft skills they use to work towards resolution. After fourteen years of close observation, (over 800 mediations ranging from high end commercial to neighbour disputes), I believe I have seen a broad spectrum of behaviours: the good, the bad and the ugly. Many lawyers are extremely effective in assisting their clients to achieve a good outcome in mediation. Others make it a difficult day indeed, for a mediator charged with helping parties reach an accord.

The lawyers who are head and shoulders above the rest haven't necessarily more legal acumen, advocacy skills or experience; to the contrary they stand out simply because they understand some of the basic principles of human psychology involved in negotiation.

I may get challenged on my typology of the good, the bad and the ugly and I look forward to the debate. I accept that mediators do see things differently from lawyers at the table. The "neutral" helicopter view is quite different from the hands - on negotiator approach required on the deck. However, just as the helicopter view of the conflict has legitimacy and adds value at the table, so there may be value in my sharing my observations on negotiation styles.

The Good

The good negotiator is a knockout. Not a punch them until they're down kind of negotiator, but a silver tongued wordsmith who covers all the bases in working towards a settlement. They come into the negotiation knowing

what may be a winning solution for all and having all the tools required to convince the other participants of it.

A real understanding of what makes people tick, how to be persuasive and how to work with others in deconstructing conflict and building a platform for a new agreement are key skills for the effective negotiator. These lawyer negotiators are empathetic, understand how diplomacy works and use likeability and reciprocity as negotiation tools.

The Client Focussed, Interest Oriented Negotiator

Savvy lawyers approach every aspect of a negotiation focussed on their client's goals and on the likely goals of the other party/ies.. They have done their homework , drilling down from the superficial characteristics of the dispute to the real subconscious motivators of it. They have assessed what needs to be done to promote a resolution of the dispute, which is in both their client's interests and likely to be acceptable to the other party/ies.

They have identified both the deal making and the deal breaking factors. They have prioritised their client's interests and know where the concessions can be made and how concessions can be bought.

These lawyers are not driven by a personal agenda, for example, proving to the other side that their legal analysis is superior, point scoring through dramatic advocacy, or holding firm to positions in a show of Goliath strength. They are pragmatic advisors who are out to get the deal which will most effectively meet their client's needs and have the least impact on their client's pocket, both in terms of outcome and dispute resolution method.

The Empathetic Negotiator

Real empathy goes a long long way. Do not underestimate it. The core competence of the empathetic negotiator is that he understands the value of making connections. He knows that if he recognises the human dimension of negotiation, there is scope for a new conversation about the dispute and its ultimate source, which is usually the breakdown in relationship between the parties.

He does this himself in a range of different ways, through small talk, courteous gestures, asking questions to establish areas of shared experience, expressing understanding and he coaches his client to do the same. Empathy motivates a negotiator to listen for the subtext in what the other party says, which often reveals the path to resolution.

Lawyers for health providers for example, who draw the other party out about their concerns and fears and express regret or a mutual sense of frustration that past communication has been poor, help complainants move towards closure. By contrast, a lawyer for a health provider who makes no eye contact and is so defensive that he cannot make even the most mild acknowledgements regarding the other party's perspective of events, will make little headway in the negotiation.

The Diplomat

Diplomats know that it is not only what you say but how you say it. They also know that if you are seeking to gain the trust and the respect of the other side, essential ingredients for an effective negotiation, you need to model that behaviour.

You can't credibly claim to be working in collaboration with the other party to achieve a good outcome for both parties if you show inflexibility in your position, (eg by making make one hundred percent statements "it is this or nothing", or "that approach leads nowhere"), or are disparaging of their view ("you can't really believe that this argument has merit"), or worse still, abusive.

Negotiators who are reasoned and measured in their language and tone encourage others to stay tuned in and are more believable. Time and time again, I have parties who feel they are being spoken to rudely, patronisingly or with excessive legalese by the other side's lawyer, wishing to avoid any further joint sessions and resisting any settlement overtures made by that lawyer.

Reciprocity and Liking

The principles of reciprocity and liking can be used to very good effect in negotiation. Effective negotiators make concessions and ask for reciprocation. As we are hardwired to reciprocate kindnesses even if they are unwanted and unrequested, this is a proven winning strategy. For example, a successful negotiator might say "if we agree to perform A, will you pay B ?" or "if we were to agree to drop that term in the agreement would your client be willing to add a qualification to clause 4 ?"

Reciprocity does not only extend to concessions; it can relate to proposals, disclosures, offers, evidence sharing and so forth. For example, "we have

looked at this problem and our respective client needs and have developed proposal A as a possible way of resolving the issue. How about you let us have your proposal which seeks to achieve the same objective.”

Just as the main work of counsel in a trial is to make the judge or jury like his client, liking is also a powerful tool in the hands of a negotiator. Whilst you may not be able to persuade the other side to like your client, given all the water that has passed under the bridge by the time you get to the mediation table, you can get them to like you. People do say yes more often to people they like.

I am impressed by how well some lawyers get the client on the other side to like them. They do so by using an appropriate level of familiarity, finding common ground, mirroring and matching their body posture and verbal style, and through genuine empathy and understanding.

The Bad

Mr Bluff and Bluster

Lawyers who posture excessively, whether it is because they don't know any other way to advocate for their client, or because they are just having a bit of fun, show a deep seated lack of awareness of how non lawyers feel about gamemanship. It is not usually inclusive of all those at the table and very troubling to some clients and opposing parties. I have observed in multi-party mediations, especially in construction claims or insurance claims where a number of counsel know each other, other parties for whom the negotiation is a serious business and to be treated as such, feeling estranged and upset by lawyers joking around or posturing.

Any perceived overstatement puts the speaker's credibility at immediate risk and makes the listeners more resistant to listening. It may be thought to be a useful way to intimidate or persuade, but in my experience it is more likely to result in parties losing trust in the person and the process, digging their toes in and ultimately, in deadlock.

The Poker Player

The Poker Player holds all of her cards close to the chest, in particular, her trump card that she perceives can be used strategically at trial. This is

counterproductive to a good outcome in mediation (the reason, after all, we are at the table). Not playing the one card which might make a difference also seems so shortsighted when the days of surprise tactics at trial are long gone.

Non disclosures may relate to significant factual and expert evidence, not referring the other side to a relevant case, and not offering a clear analysis of the client's legal position or settlement needs.

One situation where non disclosure often occurs, is where a negotiator indicates that his client is impecunious and will pay X Dollars today to settle the matter, but otherwise will go bankrupt if a higher amount is awarded against him at trial. This is a legitimate card to play if it is the truth, but it needs to be supported by evidence and often there is an unwillingness to do so. If the claim is appropriately made, then why can't it be substantiated by a declaration of assets.

The Closed Mind Negotiator

There are many versions of "this is a cut and dried case, we will walk all over you in court." This mindset is accompanied by a non listening attitude, a highly positional stance, inflexibility and a stuck negotiation. It is not difficult to see how this mindset is achieved given lawyers' known predisposition to selective fact gathering and legal analysis. Lawyers are often subject to the anchoring trap (over reliance on first thoughts), the confirming evidence trap (seeing what you want to see) and the over - confidence trap (being too sure of your knowledge and ability).

It is difficult to stand outside our interpretations and adopt a different lens. Counsel who have the willingness and ability to do so have much better prospects of success in negotiation.

The Ugly

The Abusive Negotiator

Abuse rarely goes down well, whether it be an accusation of unethical or unprofessional behaviour or more subtly disparaging "we can see no merit in that argument whatsoever". Ridicule, abusive language and threats all tend to have the same result. Rather than causing the other side to collapse or capitulate, they tend to close down the discussion, alienate the other parties and the mediator is required to do considerable legwork to overcome the negative consequences.

If you are seriously concerned about the truth of a statement made by the other side's lawyer there are many ways of challenging it without sabotaging the mediation, for example "What is your basis for that claim, you will need to provide us with an evidential foundation for it...".

The Lazy Negotiator

You may wonder why this is in the Ugly category, but a wasted opportunity is a lost opportunity and it can be very difficult to persuade parties who have had an unsuccessful shot at negotiation with you, to have another go. Your best chance at settling a dispute in mediation is usually your first chance. I have observed multiple mediations in respect of the same claim under the Weathertight Homes legislation and when a claimant is unprepared in round one, the settlement prospects in subsequent rounds are never as promising.

Negotiators who cannot provide a breakdown of quantum for respondent parties, cannot explain fully their reasons for taking a particular position, do not have an expert available to expand on an expert opinion, have undertaken half-baked legal analysis, or who come to the mediation without a draft settlement agreement, cannot complain when the negotiation goes south.

Where lawyers have had limited or no contact with other parties' counsel in a longstanding dispute, in advance of the mediation, the prospects of a smooth run in mediation are also reduced. Good negotiators set the stage for the negotiation well in advance of getting to the table.

Using Surprise as a Lethal Weapon

There are a number of lawyer negotiators who regard surprise as a lethal weapon and reveal trump cards at mediation without prior notice to the parties. This is often in the form of new detailed expert opinions or new quantum claims. Surprise does not provide leverage in a negotiation but tends to ambush it. It allows the other side no opportunity for analysis, informed decision making, review by experts, or face saving. The likely result is no settlement at mediation.

The Deceptive Negotiator

Deceptive conduct is arguably inevitable in a negotiation . It is however, a matter of degree. At one end of the scale deceptive negotiators may tell the other party that they want to settle for more than they really expect, to try to inflate their client's settlement options. At the other end of the spectrum they introduce factually erroneous information e.g. false documents or false statements to influence a negotiation. If these lies of the latter kind (capital L lies) do not cause the negotiation to fold then and there, they can and do undo an agreement reached in mediation. They also do significant harm to a negotiator's credibility. As credibility appears to be a key factor by which negotiators rate each other, reputations can be enhanced or lost on the basis of both first hand and anecdotal evidence regarding credibility.

Conclusion

An effective negotiator is a joy to observe. They are firm but flexible advocates for their clients. They are also consciously aware of the human dimension of mediation. They are persuasive speakers but also empathetic listeners, measured in their language and reasonable with their proposals. Above all they are focussed not only on their client's but all the parties' interests.