

Your Counsel: Tips to practice civility during your mediation



Steven Modica

Lawyers tend to limit their practice to a few areas. Nonetheless, people come to us with myriad problems — many of which fall outside our expertise.

Through this column, we provide practical information to help you assist those

who have employment, disability benefit, workers' compensation, and related problems. In my experience, those problems often are best resolved by the parties themselves and not by a judge or jury.

For over two decades, I have served as an impartial mediator in hundreds of disputes (most arise in personal injury, civil rights, employment and breach of contract cases). I also have represented many parties who have participated in mediation during the 35 years that I have been a lawyer.

Norman Feit, a distinguished former practicing attorney who now provides mediation services, offered eight useful "mediation specific" civility standards in an article published in the *New York Dispute Resolution Lawyer* (Summer 2020 issue):

1. Do not misuse the mediation process. Mediation should be reserved for genuine and sincere efforts to resolve disputes and not for other tactical purposes (e.g., litigation delay or for "free discovery" from an adversary). Abusing the process initially will make any later effort less likely to succeed and will waste precious resources of those involved.

2. Be polite, constructive, and efficient. All participants should strive to create the most positive atmosphere to facilitate a resolution. A combative atmosphere and difficult demeanor defeat that objective. In my experience, a resolution occurs more often when all are polite, constructive, and keep the process moving.

3. Be reasonable and realistic in submissions and presentations. Mediation is not a place to declare victory. The facts and legal analysis can be presented and discussed in an even-handed manner with concessions where appropriate (e.g., risks exist, the law is not settled, fact finders may differ, etc.).

4. Avoid lectures, personal attacks, and finger pointing. Attacking your opponent, particularly on a personal level, creates defensiveness, inspires retaliation and may lead to an abrupt end to the mediation. We can disagree without being disagreeable. If a participant disputes an opponent's legal or factual points, the differences should be expressed on the merits without demeaning rhetoric, commentary or name-calling.

5. Communicate in a calm manner without bitterness or criticism. While mediations can involve heated emotions, losing one's cool stifles engagement and constructive dialogue. If temperatures or emotions rise, it is best to take a break — even to the point of suspending the process — rather than introducing emotions.

6. Do not posture unnecessarily; do not wait until the eleventh hour to be realistic. Being civil must not supplant or compromise bona fide negotiating strategies. That said, mediations can be undermined quickly by unnecessary posturing, stratospheric/miniscule negotiating positions that have no chance of success or frustrating refusals to be realistic until the eleventh hour. Getting "real" as soon as possible creates momentum and positive energy that helps to resolve disputes.

7. Do not make threats. Threats back opponents into a corner and discourage compromise. Mediation is a consensual process where all participants should act in good faith.

8. If a mediation session fails, end on good terms; do not burn the future settlement bridge. Although a mediation session may not end in a settlement, it can still

be a positive experience. This can become part of a longer-term settlement opportunity unless the mediation ends on a sour note. Do not burn the future settlement bridge. It often takes multiple mediation sessions — some months or even years apart — to settle a difficult case.

I have two of my own civility standards to add:

9. Prepare your client to follow these same standards of civility. Civility in mediation applies to ALL participants in the process, not just the lawyers. Counsel your clients about these civility standards, what to expect, how to act and how to address the adverse party and their counsel. I am shocked that lawyers often do not prepare their clients to handle these issues appropriately.

10. Civility applies to ALL mediations, including those conducted virtually. Using Zoom to conduct a mediation does not suspend the standards of civility (or common sense). One party in a recent case sat at her kitchen table wearing a partially opened bathrobe while smoking a cigarette and swearing repeatedly. An attorney in a recent case spent most of his time playing a game on his smart phone. Mediators are not judges; however, they should be afforded the same respect because mediation is an important and quasi-judicial proceeding.

I urge you to embrace mediation and other forms of alternative dispute resolution to help resolve your clients' problems. If you have any questions about the process or need mediation services, please contact me.

Steven V. Modica, Esq. is the principal attorney and owner of the Modica Law Firm, a small firm that has served the Rochester community since 1995. If you enjoyed this article, please "like" Modica Law Firm on Facebook to stay current on all that we're sharing. If you have questions about this article or want to suggest a future topic, contact Steve at 585-368-1111 or Steve@ModicaLawFirm.com.