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Losing Ground: Resolving Toxic Disputes

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When reaching an agreement, the ideal is a win-win scenario. At worst, everyone being no better nor worse off than before – a *status quo ante bellum* of a negotiation or a dispute – is often achievable. In many contexts, though, from a contentious collective bargaining agreement to a protracted child custody dispute, costs can pile up while benefits diminish.

In drastic cases, companies can enter plant shutdown situations, or individuals can face bankruptcy proceedings. These are among the most stressful disputes for parties.

How can an advocate or a mediator help parties avoid a potentially catastrophic lengthening of a toxic dispute?

FOCUS ON THE BEST POSSIBLE OUTCOME FOR *YOU* RATHER THAN THE WORST POSSIBLE OUTCOME FOR *THEM*.

Negotiating with the intention of hurting the other party, whether financially, emotionally or otherwise, rarely produces a result that will be satisfying. This is especially true of a representative negotiator; the more a lawyer's bill ticks upward, the less money the client may have to reinvest into the business (or even his or her own personal finances). Find ways to quell the bleeding, if at all possible.

If the dispute is iterated (i.e. repeated or continuous), the parties will have to interact with each other again, and no one wants to interact with someone whose stated intention is to hurt them. If the dispute is non-iterated (i.e. a one-time dispute, typically between strangers such as an injured plaintiff and an insurance company), why expend energy to hurt someone who will soon be in your past?

BEGIN WITH THE END IN MIND.

Before each negotiation, whether in the presence of a mediator or otherwise, think "What would I like to achieve here?" and then build a concrete solution. This may an aspiration point,[1] or it may simply be the alleviation of mental stress. The important part is that your goals are in clearly defined terms. Thinking in terms of "The best I can get" or "Winning" is too amorphous to communicate a strategy that will make sense to any of the people in the room – on either side, or neutral.

Think about how your life looks ten minutes after the ink on the agreement dries. What does it look like? Where do you want to be?

RANK YOUR PRIORITIES.

In any multi-issue negotiation, there are:

A. Essential terms: Without these items, you cannot justify reaching an agreement. Be realistic in setting these; not every item is essential. Often, you only have one essential term. (In the case of a neutral, the essential term may be that each party agrees not to reignite the dispute.)

B. Aspirational terms: These are items you would like to see, but that you do not need all of to reach an agreement. Often, some fraction of these items will suffice, such as two out of four. Other times, some aspirational terms will be as important as many others combined. Defining aspirational terms is one of the most challenging but rewarding areas of negotiation preparation. Warning: you may need a spreadsheet.

C. Less important terms: By establishing an open and honest framework, you can try to figure out what the other side wants most. If that item means less to you, you can offer it early in exchange for an item you want more than the other side.

REACH AN OPENING AGREEMENT.

Often, this is an agreement based on *process* rather than *substance*. Maybe you are far apart on key numbers, but you can agree to bracketed arbitration. Maybe you are far apart on how many days the children spend with each parent, but you can agree that the whole family will meet every Saturday at an Ontario Early Years Centre. Once there is empirical proof that the parties can agree on *something*, further agreement becomes far more realistic than it would have been otherwise.

As an advocate, your client will have to consider these issues. As a mediator, you will likely encourage parties to consider them.

ABOUT THE AUTHOR

Matthew Gordon is a Toronto-based lawyer with experience in constitutional, labour, employment, family, and general litigation. He is the Ontario Bar Association ADR Newsletter Editor.

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[1] An *aspiration point* is what a party would achieve in a perfect, yet realistic, world. It may be a "top dollar" offer, or the best-case scenario based on the market for a good or previous case law. It is often presented as an opening position in a dispute.