ADR Perspectives
Perspectives PRD

Perspectives on alternative dispute resolution for ADR parties and their lawyers.

Perspectives sur la résolution des différends pour les parties et leurs avocats.

February 2017 / *février 2017*

The Secret to Settling Legal Disputes

Mitchell Rose

"It is better to talk jaw to jaw than have a war" - Winston Churchill

Years ago, before I evolved into a Settlement Counsel and Mediator, I learned a valuable lesson from a fellow litigator. We represented opposing sides in the early stages of a bitter commercial dispute. We exchanged the usual volley of letters setting out a litany of demands and allegations. Tensions between our clients continued to mount. One day, opposing counsel made a bold move –something I occasionally did back then, and almost always do now: He picked up the phone and called me. We discussed the case, off the record, and started down the bumpy path toward an eventual settlement.

"Now isn't this better than writing those letters back and forth?" he remarked.

It was.

We had further telephone discussions. Later, we held an in-person meeting with our clients present. This led to our creation of a tailor-made mediation-arbitration arrangement for resolving the case. Some months later, the case settled at the first mediation session. Throughout, my colleague and I remained fearless and fastidious advocates for our respective clients to the end. Both of us raised every issue that needed to be raised and we continued to take strong positions where warranted.

No one sang Kumbaya. There were no ponchos worn, and no tambourines played idly.

We simply kept an open dialogue.

Had we not spoken at an early stage and continued to speak in the ensuing months, our clients would have spent significantly more money and time, and each would have incurred substantial risk, by litigating the case in the normal fashion.

Tel/Tél: 416-487-4733 Toll-free/Sans frais: 1-877-475-4353 Fax: 416-901-4736 Email/Courriel: admin@adric.ca

The point of the story?

The secret to settling legal disputes — even the most bitter, acrimonious cases — is to talk. We are social animals, and therefore hardwired for face to face and voice to voice interaction. However, it is too easy to take hardline, angry and unrealistic positions in emails, texts, letters and even court documents. We are hiding behind the written word and the keyboard that creates it. When we speak, we cannot hide. Meeting face to face is best, but talking on the phone or on-line are good runners up – at least in the early stages. Often, a mediator is needed to permit parties or lawyers to interact, even indirectly. Any form of talking is better than silence.

While talking brings us out from our hiding places, it does not prevent us from being strong, or cause us to capitulate. We can vehemently disagree with our opponents, but talking can create the optimal conditions to humanize our opponents and lead to creative problem solving. It is a sign of strength, not weakness.

Legal professionals and mediators, who should be emotionally uninvolved in a dispute, must promote dialogue and lead the way. This means:

- Consider hiring lawyers and paralegals who are strong advocates, but who are dedicated to exploring resolution. For example, as Settlement Counsel, my role is to advise and stand up for my clients and pursue an early settlement. However, if a lawsuit ensues, or must continue, the matter is turned over to a separate litigator who can focus strictly on preparing the matter for an eventual trial or arbitration. I remain in the picture, continuing to explore settlement possibilities (in other words, I look for opportunities to talk).

- Pay careful attention to local rules and practice directions. For example, lawyers and paralegals in Ontario, the jurisdiction where I practice, are essentially obliged to 'talk settlement' under their governing body's Rules of Professional Conduct. As well, in civil cases under the Simplified Procedure (generally, claims between $25,001.00 – and $100,000.00), Rule 76.08 calls for a telephone or in-person conference early in the case. If, as a litigator, the thought of settlement discussions makes you cringe, consider engaging a more settlement-inclined lawyer to pinch-hit for you.

- Be willing to sit down, preferably, with all parties at an informal settlement conference and at mediation.

- If the other side is self-represented then invite them to participate in an early mediation whether or not mediation is mandatory in your jurisdiction.

- Mediators need to keep parties and their legal professionals talking, even through him or her, any way they can if communication breaks down at mediation. They can also follow up with lawyers following the mediation if a settlement is not reached. Creating an atmosphere for dialogue — and then using that atmosphere to the parties' mutual advantage — is a key skill of a good mediator.

- Mediators and legal professionals always should look for openings that can lead to continued conversation and eventual resolution.

- Keep talking – but remember to listen as often as you talk. Everyone needs to be heard. If parties in conflict don't feel heard at a mediation or in some other forum – then they are going to need to be heard by a judge. As Churchill remarked (I'm on a Churchill kick, as you can tell): "Courage is what it takes to stand up and speak. Courage is also what it takes to sit down and listen."

Not every case can settle early — or even at all. However, in my experience, talking to the other side, directly or indirectly, often leads to early resolution or provides some other benefit, such as gaining a better understanding of the issues, the personalities and motivations involved.

The time for reading about talking is over. Now pick-up the phone and call your opponent, or, better yet, make a lunch appointment.

Mitchell Rose is a Toronto Mediator, Lawyer and Settlement Counsel (Dispute Resolution Lawyer) with Stancer, Gossin, Rose LLP ("SGR"). His practice is focused on employment, business and neighbour disputes – along with other types of civil matters.
He has been a practising civil litigator for over twenty years and a mediator for the past nine years.
Mitch was called to the Ontario Bar in 1995. He joined SGR in 1999.
http://www.sgrllp.com/mitchell-rose-cv/