"Mediation and Other Stuff"

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Welcome to my monthly, more or less, newsletter about alternative dispute resolution from an Ontario perspective.

As we move into fall it's a good time to reflect on the basics of what we know about negotiation and alternative dispute resolution. In this newsletter I have gone back to the book that made "principled negotiation" which is now the dominant way in which legal and business negotiations are conducted accepted, Roger Fisher and William Ury's classic, *Getting to Yes*.

Published in the early 1980's, its continuing hold over negotiation strategy is astonishing. While there are definitely more sophisticated works available today, this is a good place to start whether you are beginning a career involving negotiation or just brushing up on what you do every day.

While reading about the book, keep in mind that its subtitle is: *Negotiating Agreement Without Giving In*. Some clients and counsel still have a difficult time moving from legal "positions" to underlying "interests". However

it is only by meeting both your client's and the other party's interests will an optimal and sustainable solution be found in most disputes. As a bonus for lawyers these types of integrated settlements lead to a more satisfied client!

Instead of a case this month, I have focused on a blog post from Australia which raises similar issues concerning lawyers and mediation as those which we seem to be discussing in Ontario.

I am honoured to have been invited to participate in a panel discussion, "Condo Mediation - Unraveling the Mystery," at the Canadian Condominium Institute/Association of Property Managers of Ontario 15th Annual Conference in Toronto on November 4, 2011. It should be an interesting discussion especially as mediation is met with a fair amount of resistance in the condominium community even though it is generally the most effective ADR process given the on-going relationships that most condominium disputants will have in the future.

Enjoy the weather over the next few days and the Thanksgiving weekend.

If you have a topic that you would like covered in my newsletter, please let me know.

Colm

Getting to Yes

In a nutshell, do not bargain over positions. Easier said than done especially for lawyer's who have to base the theory of their client's case on legal positions.

Getting to Yes clearly demonstrates how arguing over positions at best produces suboptimal agreements, and at worst, decreases the probability of resolution. As more attention is paid to positions, less attention is devoted to

meeting the underlying concerns of the parties.

Often clients are looking for a business or other non-legal solution to their problems so it is necessary to consider interests in almost, if not all, negotiations. Arguing over positions is quite inefficient and damages ongoing relationships.

So what should we do? Being "nice" and giving in is not an acceptable outcome for most clients and their lawyers. Getting to Yes has a number of useful suggestions some of which are:

1. Separate the people from the problem.
2. Keep your focus on interests.
3. Invent options for mutual gain - the "win-win" approach.
4. Look for objective criteria supporting what you want or need.

Looking at these points in more detail shows us how to use them.

Separate the people from the problem

You must keep in mind that negotiators are people first and every negotiator has two kinds of interests, the topic of the negotiation and the relationship with the other negotiator.

- The relationship tends to become entangled with the problem.
- Positional bargaining puts relationship and substance in conflict.
- If possible and it usually is, separate the people from the substance of the problem.
- Put yourself in their shoes.
- Do not blame them for your problem.
- Discuss each other's perceptions.
- Make sure they fully participate in the process and as a result have a stake in the outcome.
- Let people save face by making your proposals consistent with their values.

In dealing with this concept, you must recognize and understand emotions. This is not easy for many lawyers

except perhaps in family law, as lawyers are trained to be "rational." It is important to acknowledge emotions as legitimate and allow the other side to let off steam. This means not reacting to emotional outbursts. This is easier said than done.

The key to success in negotiation and mediation as in any type of advocacy is persuasion through communication. Listening is not just sitting there; it is an active process and involves acknowledging what is being said by the other party. When we speak, we must do so in a way that helps understanding and remember to speak for a specific purpose not just to hear ourselves doing so.

It is not easy sometimes to build a working relationship with the other side but it is important if you want to deal with the problem.

Keep your focus on interests

Interests define the problem. Behind opposing positions are the potential for shared and compatible interests, as well as the obvious conflicting ones.

- Realize that each side has multiple interests and acknowledge this.
- Identify shared interests and focus on mutual options for gain.
- The most powerful interests are basic human needs and wants.
- How do you identify interests? Ask "why?" and/or "why not?"
- Think about their choice.
- Look forward not back.
- Be firm but flexible.

Invent options for mutual gain - the "win-win" approach

Remember that in most cases there is more than one solution and that "win-win" means that both sides win, or at least do not lose, not that one side wins twice!

- Solving their problem is your problem as well as

theirs.
- Separate inventing from deciding - brainstorm to broaden your options.
- Identify shared interests and ask for their preferences.
- Try to make their decision easy.

Look for objective criteria

- This is something lawyers are good at doing.
- Look at how different experts, including the parties and the lawyers involved have dealt with similar problems in the past.
- Look beyond the law for trade, business or other industry standards that apply to the negotiation or dispute
- Try to agree on both sides retaining on expert.

Conclusion:

This has been a very quick overview and I recommend that you read or re-read the book. Principled negotiation produces good agreements very efficiently as long as you use fair standards and fair procedures in the process.

You should never give in to unfair pressure and in many situations you may want to consider using a mediator to facilitate the process.

It is crucial that you prepare well and make sure you know both your "best alternative to a negotiated agreement" (BATNA) and your "worst alternative to a negotiated agreement" (WATNA) so you and your client understand what will happen if the negotiation fails.

If a win-win cannot be achieved, no deal may be the best result if you have planned out your alternatives. Do not be afraid to walk away from the table but do not threaten or bluff about doing so.

As you work on improving your negotiating skills, remember that it begins with preparation and includes a lot of listening instead of talking. If you can just do that, you will be a much better negotiator.

Blog Post of the Month

The Ground is Slowly Shifting, but are Lawyers moving with it fast enough? Published by Chris Whitelaw on September 20, 2011 in Australian Dispute Resolvers: A National Blog Site

The author, who has been a practicing lawyer for 30 years as well as a mediator and arbitrator comments:

> Over the last 5 years or so we have seen a very unfortunate development - a style of mediation that lawyers have embraced as the predominant model that is a direct product of the legal mindset rather than the mindset of a true practitioner of alternative dispute resolution. I call it the "hosted settlement conference" model of mediation, a model that literally throws most of the arsenal of ADR tools out the window and relegates the mediator to being no more than an official host of lawyers from both sides of the dispute conducting a settlement conference with their clients present a few months out from the trial. This model fits very snugly into a lawyer's overall litigious approach to resolving disputes. This model continues to foster litigation as the predominant mechanism for resolving disputes but makes it almost mandatory now for lawyers to persuade their clients to "go to mediation" before the court case manager fixes a date for trial. It is no more than a pit stop just prior to trial that is now "part of the justice system"....
>
> My own direct experience and my conversations with other legal and ADR practitioners convinces me that whatever discussions and conversations are going on "behind closed doors" between lawyers and their clients ... the majority of solicitors still favour commencement of litigation as the first step and then building up the case as a show of strength before they open the door to mediation and a mediated settlement...

> Bottom line, in my opinion, is that most lawyers DNA, training and mindset works against the probability of early ADR and early resolution of the dispute.

We have had the Ontario Mandatory Mediation Program since January 1999 in Toronto, Ottawa and Windsor but my experience as a mediator over the past 12 years tells me that the approach to litigation described above also is alive and well in Ontario. The addition of ADR courses to the law school curriculum, although usually as an "optional" course, is a step in the right direction. The culture of litigation in Ontario has changed and good lawyers today see mediation and other ADR processes as tools to be used when appropriate. There is absolutely nothing wrong with this approach and mediators should not be overly critical when lawyers choose litigation over mediation in certain cases.

As we know, there is more than one model of dispute resolution, so it is somewhat counterproductive to be critical of the dominant legal model of dispute resolution without properly explaining the available alternatives. Education of mediation consumers is our responsibility as mediators. It is also an opportunity to work with lawyers as allies rather than competitors or worse, enemies.

Part of mediation's utility is that a mediation process can be custom designed to fit the specific dispute in question. Mediators need to do more to help lawyers and their clients adopt mediation as the appropriate dispute resolution mechanism. Remember, we may be the process experts but the process itself belongs to our clients.

We need to make it clear that the essence of mediation is using the model that works for the case not slavishly following the mediator's preferred model. Mediation moves across a spectrum from facilitative to interventionist and evaluative and back in one case. That is its strength and why it works in 80% plus of cases. Hopefully in the near future consumers of mediation services will see this benefit and early mediation will be more widely accepted and used.

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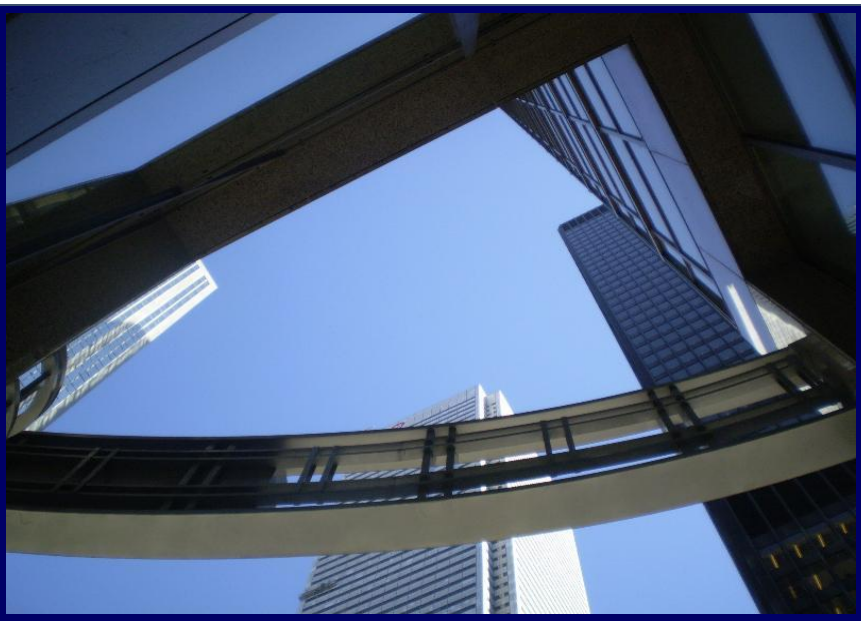

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