

CHAPTER 6 - CHALLENGES & STRATEGIES

Overcoming Resistance to Using ADR

Although mediation/alternative dispute resolution has grown rapidly over the past several years, there is still considerable resistance to it. There are a variety of reasons, and sometimes excuses, cited by attorneys for the failure to use mediation/ADR more widely. Here are a few:

Good Lawyers Can Settle Cases Directly

- To an important degree, this is true, but there are special advantages to coming fresh to a situation, appearing neutral to all sides, and having one's priority be to make peace and maximize benefits for everyone rather than obtain the best deal for a single player.
- ADR techniques have not been taught in law or business schools until recently. And just as sophisticated clients benefit from the outside perspective provided by a good lawyer, so even experienced negotiators can perform more effectively with the help of a mediator.

We Don't Yet Know Enough To Settle

- While it is true that parties need basic information about the merits of a case in order to settle it, experienced counsel and sophisticated parties, working together, can avoid lengthy discovery.
- The large amounts of time and money commonly spent on adversarial discovery are not often necessary to lay a foundation for a good settlement, and the information one gains through legal proceedings is not necessarily the most relevant for negotiations.
- Mediation often produces the best discovery of the participants' needs and interests, as well as the path to an effective settlement.

The Other Side Might Exploit Our Good Faith

- Lawyers often resist mediation because they fear that by expressing a willingness to mediate, they will signal the other side that their case is weak or that the client is anxious to settle. They also fear that their adversaries will exploit the process for delay or to obtain ammunition for trial.
- In most cases litigators do eventually manage to raise the issue of settlement with their opponents, although often late in the game after significant costs have been incurred and parties have become entrenched in their positions.
- Mediation makes beginning negotiations easier because the neutral can become the advocate for the settlement and each side can permit itself to be coaxed into staying at the table. Mediator can also impose ground rules to protect the parties from exploitative tactics.

Some Cases Have to Be Decided By A Court

- While some disputes are so novel and important that they require a public judgment or precedent that only a court can issue, such cases are rare.
- Even in high-stakes symbolic cases, the parties are often better off settling in an imaginative way than seeking the limited remedies available from a court.
- Also, perceptions can change during the life of a case, and the principled dispute that seemed too important to compromise initially, a year or two later may be viewed as a nuisance that should be disposed of as quickly and as cheaply as possible.

What Will Lawyers Do If Peace Breaks Out?

- The problem is less serious than trial lawyers may fear. Good lawyers do get good results in the mediation process, and most clients want legal representation when they mediate.
- Lawyers really do not want to try every case. They can use ADR to settle their questionable cases and put their energy into the cases they want to pursue in court.
- Whether or not ADR flourishes, conflicts will remain and there will still be a central role for advocates.

Challenges and Strategies for Conciliators in Facilitating Settlement (Wearing the Mediator Hat)

During the "Exploration of Settlement" Phase of the Conciliation Process, the conciliator's overall goal is to stimulate constructive negotiations. Conciliators should ask themselves two questions:

1. What **obstacles** are preventing the parties from settling this dispute themselves?
2. What **strategies** are most likely to overcome these barriers and bring the negotiations to closure?

A. Obstacle: *Procrastination:* parties or counsel are unwilling to raise topic of settlement – fearful will show lack of confidence in case or over-eagerness to bargain; reluctant to confront unpleasant issues; hoping discovery will rehabilitate their position or other side will give up; personal friction between the attorneys or the parties.

Strategy: Create a "Settlement Event" to provide focus and encouragement of compromise; impose benchmarks and deadlines to induce closure. Use the conciliation as the settlement event or set up a mediation; set up specific block of time for the session and invite the key players; state your expectation that the parties are open to compromise and that the case will settle.

B. Obstacle: *Need to Vent Arguments and Emotions:* unresolved process and emotional needs; failure to settle through direct negotiations may be because one or more of parties wants their day in court – wants process experience of appearing before a neutral, stating grievances and being heard; besides arguing substantive issues, parties may want to express feelings about events that gave rise to the controversy or about how they have been treated since the dispute arose.

Strategy: Provide a "day in court" through the opening session; allow each side to tell their story (provides parties with psychological benefit of listening to their counsel argue their case to their opponents; allows each side to hear a direct summary of the strengths of the others case; allows parties to meet the emotional need to express feelings to one's adversary and the neutral); help disputants express emotions in caucus (allows parties and their attorneys to release some of the anger, sadness, frustration and other negative feelings that they have about the dispute; makes feelings less of a barrier to settlement)

C. Obstacle: ***Positional Bargaining:*** an approach in which each side state an extreme position and then trades concessions to close the remaining gap; parties can become locked into positions from which they cannot extricate themselves, or the atmosphere can deteriorate as they feel that they are being pressured to make more than their fair share of compromises.

Strategy: Ask for movement to restart the process, then coach the negotiators about later steps; explain opponents' perspectives; package concessions; reduce suspicion and frustration by verifying that the other side is making an effort and is felling pain too; encourage the players to think about new options; move parties from positional bargaining to principled or interest-based negotiation:

Principled negotiation bases positions on objective principles and facts, explaining the reasons for each offer or demand made; tends to be a narrow approach that focuses on the legal claims for relief; narrow because revolves around only one or two issues.

Interest-based negotiation does not limit inquiry to legal issues and remedies; creative bargainers seek to identify and explore both sides' underlying needs and interests, identify and address emotional issues and personal problems that are impeding agreement; willing to discuss matters irrelevant to the dispute and to involve clients actively in the negotiations; look for settlement packages that will advance their own interests with the least possible harm to the other side or will satisfy both sides' goals simultaneously; find resolution that is best possible fit between the parties' needs.

D. Obstacle: ***Lack of Realism about the Merits:*** Litigants are commonly unrealistic about the merits of their cases (both sides often believe that they have more than a 50% chance of winning); these overly optimistic perceptions make it harder to reach settlement; also, parties often understand the weaknesses in their case, but bluff about them in order to bolster their bargaining position.

Strategy: Reality Test: question the litigants about key issues; draw out and dramatize the monetary and nonmonetary costs of continuing to litigate; lead the disputants through a systematic analysis of the strengths and weaknesses of their case; offer a prediction of the likely outcome in adjudication.

There is a tension inherent in reality testing between being pointed enough to force the players to confront the problems with their legal options and not pushing them into stubbornness or hostility.

Thus, conciliators should begin with open-ended questions, gradually focusing more specifically on weak points and making confrontational comments only if necessary; ask merits questions in private and withhold personal opinions about the merits until conciliator has established a good relationship with the participants and is convinced that evaluation will be necessary to break an impasse. (If one or more of parties remains wedded to an unrealistic view of the merits, needs help in justifying settlement to a superior, can refer to case evaluation or nonbonding arbitration.)

E. Obstacle: *Hidden Issues:* issues besides legal disagreements that are keeping the parties apart (e.g., feelings of lack of respect among parties/attorneys; feelings stemming from the incident that gave rise to the dispute; unconscious feelings; relationship issues; miscommunication of negotiating messages)

Strategy: Probe for psychological obstacles and missed opportunities for Gains such as good past relationship between the parties; ask explicitly whether such an issue exists; approach issue first in private caucus; consider sounding out lawyers away from their clients; solicit ideas for addressing problems and exploiting opportunities; rely on the privacy of caucuses; consider using "brainstorming" techniques

F. Obstacle: *Inability to Close the final Settlement Gap*

Strategy: Propose a Settlement Package: first strongly push the parties to develop a final offer themselves; offer a package designed to be acceptable to all parties, given the history of the bargaining and their current attitudes toward settlement; ask one side to agree on the condition that the other does so as well; alternatively, label the package a "conciliator's proposal" and present it to both parties simultaneously; offer the package on a "What If?" basis, with disclosure of each disputant's consent contingent on the other side's acceptance of the terms.

Special Characteristics of Legal Disputes

Legal disputes -- disputes in which there is an actual or potential legal claim -- have special characteristics that add another layer of complexity to the conflict and call for special tactics and strategies for dispute resolvers:

- **Legal System:** The legal system often forces litigants to make arguments and seek remedies that may have little to do with what they most care about and what is causing the conflict. Parties often get involved in a lawsuit over inflammatory and largely irrelevant issues.
- **Litigation:** The litigation itself can fuel the parties' anger and suspicions, making it hard for them to think realistically about the dispute or talk constructively with each other about settlement.
- **Court Option:** The parties to a legal dispute cannot easily walk away from a failed negotiation because one or both of them have the option to obtain a binding decision from a judge, jury or arbitrator.
- **BATNA:** The value of the parties' options away from the bargaining table, known as each side's "best alternative to a negotiated agreement" (BATNA), is a key factor in most negotiations and their disagreements about the value of that alternative often dominate the discussions. This makes techniques for analyzing the merits particularly important in legal disputes.
- **Nonlegal Issues:** At the same time, the existence of a court or arbitrator as a shadow decision maker has a significant drawback: It contributes to the tendency of the negotiators to treat nonlegal issues in such disputes, such as emotional concerns and personality conflicts, as irrelevant, although in practice these factors often play a crucial role in creating impasses.
- **Pretrial Process:** The pretrial process empowers the parties to inflict significant costs and aggravation on each other. Although litigants are often reluctant to admit it, the high costs inherent in the adjudication process are another special factor in negotiation such disputes.
- **Attorneys:** Attorneys are almost always involved as negotiators or advisors to the parties. Their presence can be helpful when the advocates use their objectivity and experience to clarify issues and move their clients toward a sensible resolution. Attorneys can become a complicating factor, however, if they allow themselves to be influenced by a short-term interest in generating fees from the controversy, if they become personally involved in the disputes or cannot get along with opposing counsel, or when one party is represented by counsel and the other is not.

Conflict Resolution Tips for Conciliators

(Do's)

- Control the flow of negative language.
- Reframe issues neutrally.
- Let participants vent emotions. Show empathy.
- Actively listen and show understanding.
- Ask about personal relationships among parties and counsel.
- Look for non-legal factors in the dispute.
- Ask about the history of prior negotiations.
- Ask about litigation alternatives and costs.
- Help participants generate creative settlement options.
- Encourage principled and interest-based negotiation.
- Determine what obstacles have prevented parties from settling.

(Don'ts)

- Skip the introductory remarks.
- Assume the participants understand the conciliation process.
- Become frustrated with the parties' extreme positions.
- Focus exclusively on the legal issues.
- Ask judgmental questions.
- Ask leading questions unnecessarily.
- Usurp the negotiation process by offering advice about terms too early.
- Humiliate a participant.
- Give biased evaluations to push participants to settle.
- Give up too soon.