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STRENGTH BEYOND NUMBERS

Mediation is the message*

Clients in conflict can save time, money and worry by choosing mediation over litigation

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By Jack Zwicker

As professionals, we often feel helpless when we see clients in conflict just about to spin out of control. And those conflicts can run the gamut from partner/shareholder disputes over valuations and partner/shareholder advances to estate freezes and tax-planning strategies.

Once conflict escalates, each side invariably blames the other and seeks legal vindication by asking lawyers and courts to tell them who is right and who is wrong. When clients engage in the game of "I'm right, you're wrong, so I win and you lose," not only do they risk losing; we all lose, as partners, shareholders, employees and suppliers.

It is vital, then, that we ask ourselves how we as service professionals who work with corporate and commercial clients can sensitize ourselves to our own clients' needs so that when they find themselves in conflict, they can avoid the dangers of escalation. In fact, successful conflict management depends on the early use of "interest-based negotiation" and mediation. Not only can clients save the time, expense and uncertainty of litigation, but they stand to earn a bonus when they resolve conflict seeking a win-win rather than a win-lose solution.

JOSEPH DILLON MENSWEAR and MTL CLOTHIERS: a case study*
Two years ago I was consulted by Joseph Dillon, the owner of a high-end Ontario chain of menswear stores. The owner of this chain was a lifelong friend of the principal of MTL Clothiers, an Ontario cloth manufacturer. Both had been interned together during the Second World War and had emigrated from Europe afterward. Each was godfather to the other's children.

During the summer of 2001 Dillon had bought and paid $50,000 for cloth that it planned to use for its winter inventory. About a month after taking delivery, Dillon's tailors spotted colour defects in all of the bolts delivered by MTL. Dillon returned all of the cloth, expecting to receive a refund. When Dillon did not hear from MTL's owner for several weeks, he grew concerned. Dillon knew MTL had overextended itself the year before when it relocated its operations to a much larger plant and worried about MTL's ability to repay the $50,000. When the men met to discuss the problem, they skirted around each other, probably embarrassed by these events, and unable to resolve it on their own.

During my first meeting with Dillon, I was instructed to do whatever I could to settle, provided that there was no lawsuit issued against MTL. Litigation was the last thing he wanted, given MTL's financial difficulties and the risk of destroying a very important lifelong friendship.

Dillon instinctively understood what many clients learn only though hard experience; namely, that being right and pursuing your legal rights in the courts is no guarantee that everyone's financial or psychological interests will be met.

Given my instructions, I canvassed Dillon about the shape of a settlement that might meet the financial and psychological needs of both sides. The fact that Dillon refused to do anything that might jeopardize MTL financially leveled the playing field. Paradoxically, Dillon's willingness to give up some of its "power," i.e., the power of the law, actually enlarged the zone for possible agreement.

Because MTL was financially weaker and both sides knew it, Dillon recognized that this dispute would be settled only if his proposals were realistic.

After a few discussions with MTL's lawyer, counsel and clients met face to face. As both sides were motivated, and understood each other's financial and psychological interests, we were able to engage in immediate discussion of the available options.

Since a cash refund was not workable, the only other option was for a credit note to be issued based on the certainty that Dillon would order more cloth in the future. While MTL was willing to agree, Dillon seemed to better understand MTL's financial predicament than did MTL itself. Dillon, sensing MTL's cash flow problem, was concerned that settlement based on issuance of a standard credit note might actually work against MTL's best interests, thereby harming both. As a result, Dillon proposed settlement based on a modified credit note, which would have seen it order new bolts of cloth in the future, at a pre-agreed discount, so that over time the cumulative discounts would serve as a refund of the $50,000.

As counsel we encouraged our clients to discuss the workability of this modified credit note. In other words, we asked both sides to "reality check" their option. By getting both sides to speak honestly about their finances, they recognized that their best option was their only workable option.

A brief memorandum of agreement was drawn, reviewed, and signed and the dispute resolved. Each side spent less than $1,000 in fees to resolve this conflict.

One year later, MTL's financial footing was much improved, so much so that it could reciprocate by providing investment capital to Dillon, which sought to expand its network of chain stores.

A dispute that had the potential to cost both sides tens of thousands of dollars in legal fees and to ruin MTL financially resulted in a creative settlement that no court of law had jurisdiction to order. The parties were assisted by counsel in crafting their own agreement, applying the principles of interest-based negotiation. By so doing, they resolved their immediate problem, preserved a crucial relationship and laid the groundwork for mutual gain.

STEVE JONES v. TREVOR WILLIAMS: a case study

Last year, I was contacted by Steve Jones, a general insurance broker who had recently sold his half-interest in an incorporated, general insurance brokerage that he owned with Trevor Williams in a small Ontario city. Jones and Williams had been partners for 20 years.

The Jones-Williams brokerage had grown large enough to require the assistance of several licensed sales representatives. As a result, both Jones and Williams had agreed to hire additional sales representatives. One of the newer staff members who was hired several years before was Jones' younger brother, Edward. Edward Jones never got along well with Williams and took pleasure in poking fun at him.

Rather than reminding his younger brother that he was an employee and that his conduct was likely to cause a rift in the partners' relationship, the elder Jones remained silent, and Williams became increasingly more resentful of the manner in which he was being treated by both of the Joneses. During the spring of 2001 matters had deteriorated to the point where neither Steve Jones nor Williams was able to address the other without resorting to insults or to veiled threats. When their personal differences became intolerable, Jones decided to resort to the shotgun provision in their shareholder's agreement. The financial statements for the year ending February 28, 2001 recorded the highest-ever gross and net incomes for their company.

While Jones looked after the firm's home and auto book of business, Williams sought to expand its more valuable book of commercial insurance. Even though Williams' book of commercial insurance produced more than 50% of the firm's revenue, the partners had always appeared content with their 50/50 partnership.

By the time their conflict came to a head, neither partner could stand being in the same room with the other and any discussions became venomous and positional.

Williams accepted Jones' offer to sell his common shares and their transaction was completed one month later. After Jones sold his shares, Williams found that he had neither the time nor the interest to supervise those staff who dealt with home and auto insurance or to service that part of his clientele. Before long, customers began to cancel their policies or allowed them to lapse. Within the two-year period that Jones was prevented from soliciting the firm's clients or from competing against it, the brokerage's revenue began to drop significantly. Jones could not yet afford to retire. Because they both lived in a small city, word traveled quickly and each knew that the other was having a difficult time. They both tried to avoid one another.

When Jones contacted me last year he was desperate. Having spent his adult life in this one city, the idea of picking up and starting all over again was an impossibility. Jones asked if I would mediate this conflict. I agreed, subject to Williams' approval. After Williams agreed to name me as mediator, we set up a mediation session. I asked both parties to provide me with a brief statement of the facts and issues they wished to discuss. They did so and the mediation session followed several weeks later.

Applying the principles of interest-based negotiation, I introduced a number of basic ground rules that I asked both to consider and accept:
· Stay away from personal attacks, while remaining factual.
· Hold discussions face-to-face so that neither thinks the other is trying to influence the mediator.
· Use language carefully to *persuade one another, not the mediator*, about the things that matter most. Mediators act for neither side and have to remain impartial throughout.
· Table as many options as possible without comment or criticism.
· Discuss those options based upon the parties' needs and their workability. In other words, reality-check each option (this includes a cost-benefit analysis).
· If either side needs more time to obtain information or advice, adjourn to allow for verification before committing to a formal agreement.

They agreed to all of these ground rules, recognizing they would have to work extremely hard to engage in a real discussion with the other, and not to use the opportunity as a forum to trade insults or to engage in talking points.

Within an hour, Jones and Williams settled in and as time passed, they became more comfortable discussing the irritants that ended their partnership. It took two sessions for both to put their feelings aside long enough to recognize that their common financial interests would best be satisfied if they reconstructed their partnership. The more they talked, the more comfortable they felt about looking for solutions.

By the end they recognized neither operated well without the other. Neither was interested in forging alliances with new partners. And both realized they stood to gain financially by working together. Jones, for his part, came to recognize that he had made the mistake of not taking his younger brother aside to defend his partner. And by remaining silent at the wrong time, he worked against his own best interests.

Only once Jones and Williams were able to put aside their mutual antagonism were they able to realize where their real interests lay. By doing a "double cost-benefit analysis" (the cost-benefit of working together vs. the cost-benefit of working apart), they were able to resolve their conflict.

The tragedy of their experience, which is often repeated, is that people in the early stages of conflict do not see just where escalating conflicts are likely to take them. The more proactive you are as a professional, the better you can serve your clients' long-term interests by encouraging them to manage potentially serious conflicts before they get out of hand.

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*** Names and details have been changed to protect client confidentiality.*