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Communicating beats litigating

By Teresa F. Frisbie

Young lawyers need to be trained from the beginning of their careers to recognize the connection between poor communication and legal disputes.

I cannot count the number of times that I have completed a mediation and thought to myself, "If only the parties had bothered to have this conversation back at the beginning, there never would have been a lawsuit."

I mention this because I believe it is critical for new lawyers to enter the profession realizing they can help their clients exhaust other avenues before embarking on slow-moving and expensive litigation.

Law students (as well as the practicing bar) can benefit by increasing their own awareness of the role that a failure to communicate plays in the genesis of a dispute and by increasing their competence in the alternative dispute resolution processes that zero in on communication issues.

Not long ago I mediated two very different cases that highlighted the connection between poor communication and conflict, particularly where there is a financial fiduciary relationship.

One case involved a large family of siblings fighting over an estate, while the other involved the two owners of an LLC who were in a bitter dispute after 13 years in business together. While the legal issues in the two cases were quite different, the critical element in each was the feeling that someone entrusted with funds was stealing.

In the case involving the estate, the brothers and sisters were furious with the brother serving as the executor because they felt he had been taking money from the estate.

After participating in a facilitative mediation, where the parties stayed in joint session for much of the day and were able to not only express their feelings, but to obtain answers to their questions and review records, it became clear that what had transpired was more a matter of failing to report on a regular basis and perhaps improper commingling than conversion of funds.

When the parties had a chance to exchange information, the executor finally explained his unique reasons for delay and reticence. The reasons included feeling that it was unseemly to sell the parental home too quickly, his desire to "make up" to his deceased mother by performing repairs and his reluctance to have to talk to his sisters constantly.

Because of these disclosures, the accusation went from "you are stealing" to "you are failing to account properly and have commingled" — a much less inflammatory position. When the parties had reached this point, they were

able to stop shouting and actually hear each others' arguments and reach a resolution.

Similarly, in the business breakup case, one owner was the visionary who invented the products and the other was the details person who provided customer service and, importantly, kept track of the finances. As in the estate case, there was an accusation that a fiduciary — the details partner — had been stealing funds.

When the parties met in mediation, they finally communicated clearly about what had been occurring financially, and the details partner admitted that he had been avoiding conversations with his partner about financial matters because he knew the other partner would yell.

The details partner described himself as a person uncomfortable with confrontation who tried to avoid it if at all possible, especially with the more domineering visionary partner. This admission appeared to ring true to the visionary partner. Again, the accusation against the fiduciary was defused somewhat, and went from "stealing" to recognizing a general inability to faithfully perform the tasks necessary for a fiduciary.

In both cases I believe a lawsuit would not have been filed if the parties had communicated more effectively at the appropriate times. Also, while there is no way to verify it, in my opinion it was only after these important conversations finally took place that the parties were able to act in a practical manner and craft creative solutions.

In the estate case, it was primarily a matter of substituting executors.

In the small business case, while the partners were still beyond being able to continue in business together indefinitely, they were able to forge a way to work as a team for a number of months so as not to lose customers and disrupt the business while the necessary aspects of an orderly transition were put into place. They also agreed upon a method of communicating as they went forward.

In this age of exploding information and the resulting staggering expense of discovery, where litigating can mean paying lawyers, computer professionals and forensic accountants to review perhaps millions of documents and communications ranging from e-mails and text messages to the hard drives of various electronic devices, the use of alternative dispute resolution processes is on the rise because of the potential for saving time and money.

For this reason alone, it is more critical than ever for law students to become as competent in advocating in alternative dispute resolution processes as they are in a trial setting, and to understand that many of these processes, such as facilitative mediation, transformative mediation and collaborative law practice, often focus on the question of an earlier failure to communicate and can frequently cut to the heart of the dispute quickly by increasing communication.

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