Don't Be So Square

by Jerome F. Weiss

I recently saw my friend Lisa. She's a business planner and executive management consultant in Chicago. I still can't figure out exactly what she does. Lots of high-level relational work in which she gets top executives and companies to better understand themselves and what they do. She organizes seminars and focus groups in order to analyze approach, efficiency and validity, among other things. Perhaps most important, she helps individuals and institutions to focus on communication, both within the institution and its workers, and how those individuals and companies interface with the outside world. I find the work fascinating, even if a bit vague, since it relates to something I focus on every day in mediation: the importance of clear communication as the foundation for better understanding and resolution of disputes.

Many lawyers pooh-pooh the kind of conceptual dialogue espoused by Lisa and me for lots of reasons. Busy schedules, demanding constituents, budgetary confines, and other things including, importantly, the rules we operate under in litigation; rules of procedure and evidence being high on the list. But those rules and lawyers' boundaries as advocates – boundaries generated by those rules and other factors – deal with a world that is mainly positional in nature. Op-positional if it is a disputed matter. Op-op-positional if it is a disputed matter in litigation. What both Lisa and I do facilitates candid and open dialogue beyond the boundaries of such positions.

"The Problem with Communication…"

Lawyers are used to dealing with rules of engagement mostly in a disputative process that more often than not emphasizes communication skills aimed at persuading a trier, whether judge or jury, and not an opponent. The outcome is a process of disputants talking *at* and not *with* each other, all the time trying to persuade those strangers sitting in ultimate judgment. It is not a collaborative process.

People like my friend Lisa and I get to encourage a "different conversation" – a difficult one for most advocates in light of their familiarity and habit with the dialogue of position and dispute – in which there is exploration of such things as emotion, feelings, mindset, values, beliefs and life experience as opposed to position. We get to focus on meaningful, clear communication where we try to make the perception fit the statement. What this means is that we get to try to assure that what is heard is understood as was intended when spoken.

It was George Bernard Shaw who said that "the problem with communication is the illusion it has occurred." This statement usually brings smiles to lawyers' faces since they are aware of the residue of poor communication, where people walk away from the dialogue with perceptions that differ from what was actually intended by the communication itself. It goes without saying that if we want to understand better and collaborate to solve problems, clear and open communication is important.

And so, Lisa and I had a lot to talk about when we got together. Even though she has a business and accounting background and mine is legal and ADR based, we have much in common.

A More Rounded Discussion

Before I could open my mouth she told me that she had just finished a retreat with a Chicago law firm. She had been hired to focus on communication within the firm and to begin a dialogue aimed at bettering the group's understanding of goals, outlook and relationship potential, both inside and outside of the practice. She looked at me with a face mixed with astonishment and despair and said, "You folks are very... ." I knew what she was talking about when she said "you folks." Lawyers, of course. She gestured with her index fingers as if to make a rectangle. "Not round?" I asked. "Yes, not round," she replied.

You may gather from all of this that Lisa and I speak the same language, even if half of it is with our hands. What was so surprising to her was not new to me at all since I work with lawyers nearly every day and so I explained how the lawyers in the Chicago firm got that way. I told her that everything in legal disputes is bounded by a rectangularity that we lawyers use both as a defense and a tool of persuasion, but rarely as a means to better communicate with each other.

I pointed out some of the icons in the legal profession that symbolize this construct. We don't need to explore further than the courtroom. The bench. The bar. The trial table. The rail. The jury box. The witness box. All rectangles, at least traditionally. All barriers. Even outside of the courtroom, when was the last time you saw lawyers representing different interests in a business deal or a domestic workout, sitting on the same side of a table? All of these objects symbolize the "rectangularity of disputes," as I like to call it. There is a ruled symmetry in disputes that rarely, if ever, resembles the actual core of the dispute; however, I also explained to Lisa that without the rules and barriers we might have chaos. That being said, both Lisa and I know from experience how asymmetrical and unrectangular disputes are in reality, off of the stage where they play out.

Mediation As An Extension Of Trial: A Difficult Model

I see 130 sets of disputants and lawyers a year; about 400 — 500 people. People who for the most part are there to solve problems, mainly because they are there on behalf of clients who don't want to be in the dispute business and who want to move on with their respective lives and businesses. Likewise, most litigants don't want to be in litigation; a point validated by how much they don't participate in the litigation process. They prefer mediation partly because it gives them some control and participation. But mediation also can be a process dominated by lawyers, their format, rules and habit. Despite the assembled talent and resource and momentum in a mediation to "get it resolved," it remains puzzling to me that lawyers still have difficulty putting aside the

barriers of the litigation/position model and penetrating the deeper issues that may exist.

Mediation is a privileged proceeding that gives us the opportunity to do some things we may never be able to do in a court room, and yet we too often regress to the courtroom model of dialogue, that is aimed at persuading a judge and jury who aren't even present at the mediation. The disputants who are present at mediation are the ones with the problems, the ones who need to be understood and communicated with.

Lawyers participate in mediation in what is often a routine manner in which they merely continue to advocate their sides. Even the manner of bidding is advocatory: usually a competitive model that trades dollars in toe-to-toe fashion. In this model, there is little if any room for exploration of those issues that may reside at the core of the dispute. In fact, it can become quite combative. Many people like Lisa and I know how wrongheaded such a model can be for the resolution of disputes, since we know that "It is never about what it's about." Along with this goes another mediator's adage: "Every dispute is an emotional dispute in disguise." Disputes are, for the most part, not only about the legal and factual positions or the money.

Naturally, there are disputes that are simple and straightforward and that do not require a lot of deep digging; however, the vast majority that I mediate, whether commercial, professional negligence, complex financial disputes, employment, construction, catastrophic injury and a number of other subject matters... all of these disputes often share human components that go well beyond the nuts and bolts and substance of the "legal" presentation. Issues such as loss, betrayal, role, grief, authority, autonomy, just to name a few, loom large and need to be understood and respected. If we ever want to give ourselves the opportunity to understand the other side, we might begin by putting ourselves in the shoes of the other disputant, not the shoes of the other advocate. This will certainly not be accomplished at mediation if we continue to use it simply as a zero-sum, win-lose, adversarial substitute for trial. My experience informs me that those advocates who get this do best by their clients in what optimally should be the problem-solving setting of the mediation.

Lisa points out that there is another barrier with lawyers. She tells me lawyers are "high achievers," which is clearly code for over-achievers, and as such we, like many high achievers, seek a professional model and format that gives us shelter for our discomfort with emotion. Her point is echoed by Maister, Green and Galford in *The Trusted Advisor* (Simon & Schuster, 2001), who wrote that, "Good social skills and an excellent mind, in the professions, can generally compensate for a very large degree of emotional avoidance." Lisa says it is therefore not only our profession and its habits and rules that inhibit our getting at the human component and emotional core of a dispute, but also many of the people who are drawn to the profession.

Tear Down That Wall, Dear Advocate

A good place to begin improving our dispute resolution skills is by recognizing and addressing these barriers. There is now a developing body of science with respect to the role of the kinds of physical barriers mentioned above and how they reinforce the barriers of the trial/advocacy model and our personalities. Where we sit. How we use eye contact. How we address people. The shape of the table. Our proximity to the people we are speaking with and, importantly, how we listen and how we act when we do so.

While some of these things are the subject of endless writing, lecture and seminar regarding trial persuasion, when it comes to the art of making peace and speaking with each other and listening in a manner that develops better understanding, lawyers devote precious little resource and attention to these pieces of the puzzle in the mediation setting. Thus the responsibility usually falls to the mediator, but we need help in this regard. We need the advocates' and disputants' awareness. So, please, the next time you're in a mediation think about these things and their effect on you and the other participants. If you make yourself aware, you may just recognize a surprising thing or two.

You will hopefully ask, "How can this inattention to better understanding be when one of our major job descriptions as lawyers is problem solving and where the major purpose of mediation is to resolve the dispute?" There are answers. A big part of the answer lies in our habit and comfort in the trial model of sitting on only one side of a many faceted dispute. The "habit" piece of the problem, while easy to understand is not so simple to undo, especially in light of years of custom and tradition and the nature of our own individual training. The "comfort" component is even more complicated because it is more deeply ingrained.

As my friend Lisa and I understand, real collaboration is tougher to walk than to talk, especially when it might involve rubbing elbows and maybe a few hearts and minds together with people we have been battling with. Making love and war at the same time is not an easy trick. It's even tougher for trial advocates. Unfortunately, many of us would just as soon maintain our barriers. Lawyers' "rectangular" views as advocates of a dispute universe that in reality exceeds by far the one side they represent and that is many sided, may be better penetrated by that round table, which may be more representative of the realities of the complexity, interconnection and continuum of human relations.

The hardship of penetrating these walls is not made easier by what we are teaching our lawyers. The last time I looked at my law school's course offerings, "Heartfelt Communication" did not appear on the listing, although some inroads are slowly being made in the area of "Collaborative Problem Solving." So, while there is some progress, we have quite a way to go. My hope is that some time during my professional career I will see my friend Lisa describing lawyers with a circular gesture and not a square one.

Jerome F. Weiss is the founder of Mediation Inc and the past chair of the ADR Committee of the Cleveland Metropolitan Bar Association. He can be reached at mediator@mediationresolve.com.