

THE SECRET TO CUTTING ONIONS (AND DEALS) WITHOUT CRYING

Resolving disputes is a little bit like cutting an onion: you have to pass through several layers before you get what you want, and along the way you will likely feel some discomfort. The secret to cutting an onion without crying is a primer for "getting to yes" in the world of dispute resolution.

- **Know the score about onions (and litigation).** Onions are chock-full of a chemical compound called sulfoxide. When onions are cut, this compound is released into the air as a vapor. When the vapor encounters your eyes, it dissolves into a form of sulfuric acid, and your eyes become irritated. Armed with this knowledge, you can employ techniques that will minimize the discomfort, some of which are noted below. In litigation, you must know that 95% of all civil court cases are settled prior to trial (the percentage is even higher in Federal Court). Establish a litigation plan with that reality in mind. Take steps for an early evaluation of the strengths and weaknesses of your case. Early evaluation leads to early resolution, and early resolution will minimize your client's discomfort; and you will be considered a wise and trusted counselor
- **Use a sharp knife (to carve out your discovery).** A dull knife will crush the onion cells more than a sharp blade, and the crushed cells will release more of the onion vapor into the atmosphere. Therefore, use a sharp knife! In litigation, you may be tempted to use discovery to crush your opponent. In reality, the dull knife of discovery can crush your ability to resolve your dispute in a reasonably efficient manner. You must use a sharp knife as a discovery tool! If your discovery plan is inefficient, the enormous cost of litigation for both sides may affect your ability to settle your case.
- **Slice the onion under running water (and keep your vision clear).**
In theory, if you cut an onion under running water the sulfoxide will not become airborne, and the irritant will not get into your eyes. Lawyers and their clients encounter many irritants in our adversarial system of justice that can blur their vision about the realities of their cases. In preparing for mediation, you must run your claims and defenses under the cool waters of reason, logic and experience. You must factor in your trial judge's practices, procedures, and proclivities with respect to the evidence you intend to present at trial. You must objectively consider whether you will be able to get into evidence all facets of your case in chief in order to properly evaluate the risk of trial.
- **Cover your eyes with protective goggles (but don't forget about the other people in the room).**
This is a viable solution because the irritants in the air are prevented from touching your eyes, but the goggles will not protect anyone else in the room. Often, litigants will have the protective cover of counsel and feel confident about their chances at trial, but they may not consider the risks or consequences to the other people who may or may not be present in the conference room during negotiations: spouses and children; business associates; shareholders. Unless they've been through it before, your clients will not appreciate the personal and professional toll that is paid at trial. But you know, and you must help your client understand what a trial entails, not just in dollars and cents, but in terms of common

sense. How many days or weeks of work will your client miss due to the trial? Will a spouse or child be required to testify at trial? These kind of questions must be fully considered before your client can reasonably gauge the impact a trial will have on his personal and professional life.

- **Chill onions (and emotions) before cutting.**

When onions are chilled the vapors are less likely to become airborne when the onion is cut. Similarly, emotions that rise up in litigation must be cooled down before mediation. Your fiery brand of advocacy that is so effective in trial will not serve you well during settlement negotiations. Such emotions will certainly offend the other side and most likely render you unable to read the signs and posturing that would otherwise signal progress toward settlement.

- **Don't chop the onion root (or settlement opportunity) until the very last.**

The vapor that irritates your eyes is highly concentrated in the root end of the onion. You can minimize the tears by cutting the root end of the onion last. Likewise, you should never cut off the possibility of settlement, or at least be absolutely sure there is no possible way to resolve the dispute without a trial. Before terminating settlement discussions, you should always consider your BATNA-best alternative to a negotiated agreement-before proceeding to trial. In other words, if you don't settle the case, what is the most likely outcome if the case proceeds through trial? What are the chances of prevailing? What will it cost in terms of time and money? Conversely, what are the chances you could lose the case at trial? If that were to happen, would your client have to pay the fees and costs of your opponent? These issues and many others must be clearly understood before cutting off settlement negotiations.

Let's face it, no matter how you slice it, some cases must be tried. But given the statistical likelihood of settlement at some point prior to trial, it is essential that you develop the skills and aptitude of a problem solver. Granted, a serious discussion about dispute resolution skills does not often include references to onions, but a recognition of the irritants that often cloud a litigator's perspective can help you develop a conscious strategy to avoid them.

Ron White is a mediator in Claremont, California. The mediation tips are his; the ones about onions are adapted from "*The Secret to Cutting Onions Without Crying*" cited in Wikipedia, "Onions".