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Back to Article

'Think Different' About Business Disputes

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The film *Jobs* recently chronicled what the Walter Isaacson biography described last year. Steve Jobs was a model of "disruptive innovation" whose work stood for how much can be gained when we "think different" (Jobs intentionally left off the "ly".... to be different). And the results for Apple have proven him a visionary — the object of fascination, and even the reverence, despite his foibles.

As I practice as a mediator and arbitrator in business and health care cases, and teach dispute resolution in law schools, I encourage attorneys, their clients and law students to "think different" about conflict — either the one that I have been retained to help them resolve or, more generally, how both experienced and new lawyers might approach disputes to most effectively represent their clients.

What can "think different" mean in practice, and how can doing so have a positive impact on results? First, it does not mean that prevailing approaches are wrong or misguided. The objective is to work toward lower cost and quicker and better resolutions, approaching a dispute from the very beginning by focusing more on realizing the business opportunities that a dispute presents, as opposed to intently positioning the case to "win" or avoid the worst case.

There is substantial research demonstrating a correlation between high aspirations of negotiators and the favorable outcomes they obtain. Aiming high, as a zealous advocate, definitely can contribute to positive results. It's how you aim and go about achieving the result that can make a big difference. Process-orientation from the outset is critical.

All too often, counsel in a litigation matter allows the case to go on for a two or three years, through motions and discovery, then suggests mediation to the client as a case moves inexorably toward a trial — a trial we know statistically will occur in less than 5 percent of business cases in any event.

So in what way might counsel guide her client to think, and act, different, while aiming high? When you have a case that is most likely to settle at some stage, take a hard look at the beginning of the case for means of positive interaction with the opposing side and what interests you may have in common. That may sound fanciful in the face of an inflexible or opportunistic opponent, or because litigators are trained to hunt for the smoking gun and fully develop facts through discovery so as to ensure they are not missing anything.

But let's think different for a moment. Business cases are about business, and most companies (insurance companies aside) are not

in the business of litigation. First, consider a few assumptions based drawn from prevailing practice:

a) Dispute resolution within corporations and other business organizations remains largely evaluative and lawyer driven.

b) Experiences with mediation are mixed due to (1) slow uptake of the interest-based, value-based processes espoused by leading thinkers and practitioners in the field; (2) lawyer preference for quasi-arbitration or evaluative/positional approaches; (3) clients deferring to litigation and in-house counsel on process; (4) client experiences with mandatory and evaluative mediations; (5) perspective-taking rarely being a factor in the process; (6) mediation usually coming too late in the dispute, following escalation, antagonism, entrenched group thinking, and economic and emotional investment.

Avoid Conflict Escalation

Starting from these assumptions, shift the paradigm:

a) Early, more intentional process design integrated into dispute management strategies, adopting approaches that foster client engagement and positive interactions with the opponent, can have a significant beneficial impact on resolution experiences, costs and results.

b) Match process with client business objectives, and place that analysis front and center. Consider what would be the optimal business outcome of a dispute and fully evaluate how the dispute could be resolved to most directly meet those objectives. Carefully consider, as well, the interests of the other side and how those interests can be met along with your client's.

c) Construct strategies around avoidance of conflict escalation and entrenchment.

This last point is critical, because unnecessary hardening, escalation and contentiousness, which serve no good purpose, are the cause of most preventable costs, both direct and indirect, and can impede a constructive outcome as much as any other factor. The design and implementation of a parallel process that addresses this problem can operate in combination with, not in place of, litigation, allowing parties to protect and maintain legal rights and positions as they explore creation of mutual value.

Gobbledygook? A pipe dream? No, absolutely not. Just different, at least for most business cases as currently handled. [Short on specifics, however, which I will add in a further article shortly.] And if given a chance can yield great results. The fact is:

• Certain cases do have positive strategic potential, which is presently overlooked through default to purely adversarial processes.

• Companies need not necessarily take less forceful positions. Litigation becomes part of an integrated approach to finding resolutions through enhanced, multi-faceted processes, with a vigilant eye on value creation, interests and possible future business opportunities (e.g., cost reductions, revenue increases, time efficiencies, market share expectations, brand awareness). Simply put, creativity and improvisation works.

• Improved personal interactions do not signal or lead to weakness; rather, they almost always will produce new insights and ideas, as well as generate options for resolution that would go undiscovered in the absence of such connections.

• Structured debriefings and analyses will lead to cumulative, lasting improvements in (1) company case management and overall expense control; (2) accomplishing business objectives; and (3) ongoing risk management and conflict prevention, including encouraging business partnerships with current and potential adversaries, further lowering cost and reducing litigation burden.

Because these ideas really are different from prevailing practice, they can be rejected out of hand by litigators and clients alike who are schooled in and more comfortable within the confines of the "build your case, gain the upper hand, then wait for your opponent to come to you for settlement" approach. The further you can put your opponent back on his heels, the more favorable will be the outcome. I understand that; I operated within that framework for years as a commercial litigator.

The more I work and teach within the field of dispute resolution, the more I am convinced that lawyers and clients are unproductively constrained by these old habits and ways of thinking.

Thinking different is hard. It can be risky. Yet, tremendous opportunity and positive results, at much lower cost, can come from redirecting the focus of both counsel's and the client's attention early in the case toward direct interactions to explore mutual interests and means of achieving them, in parallel to adversary processes. Those that recognize that there is real advantage to be gained by elevating early interest identification and value creation into their work with clients will find themselves ahead of the curve. There is room—and a need—for this kind of "disruptive resolution innovation" in the way business cases are litigated. And clients, just like we users of Apple's/Jobs' iPhones, iPads, etc., will be better served.

In the next article, I will address how to get the difficult opponent to buy in, specific types of processes and how to conduct them, and why such different thinking eventually will become second nature.•