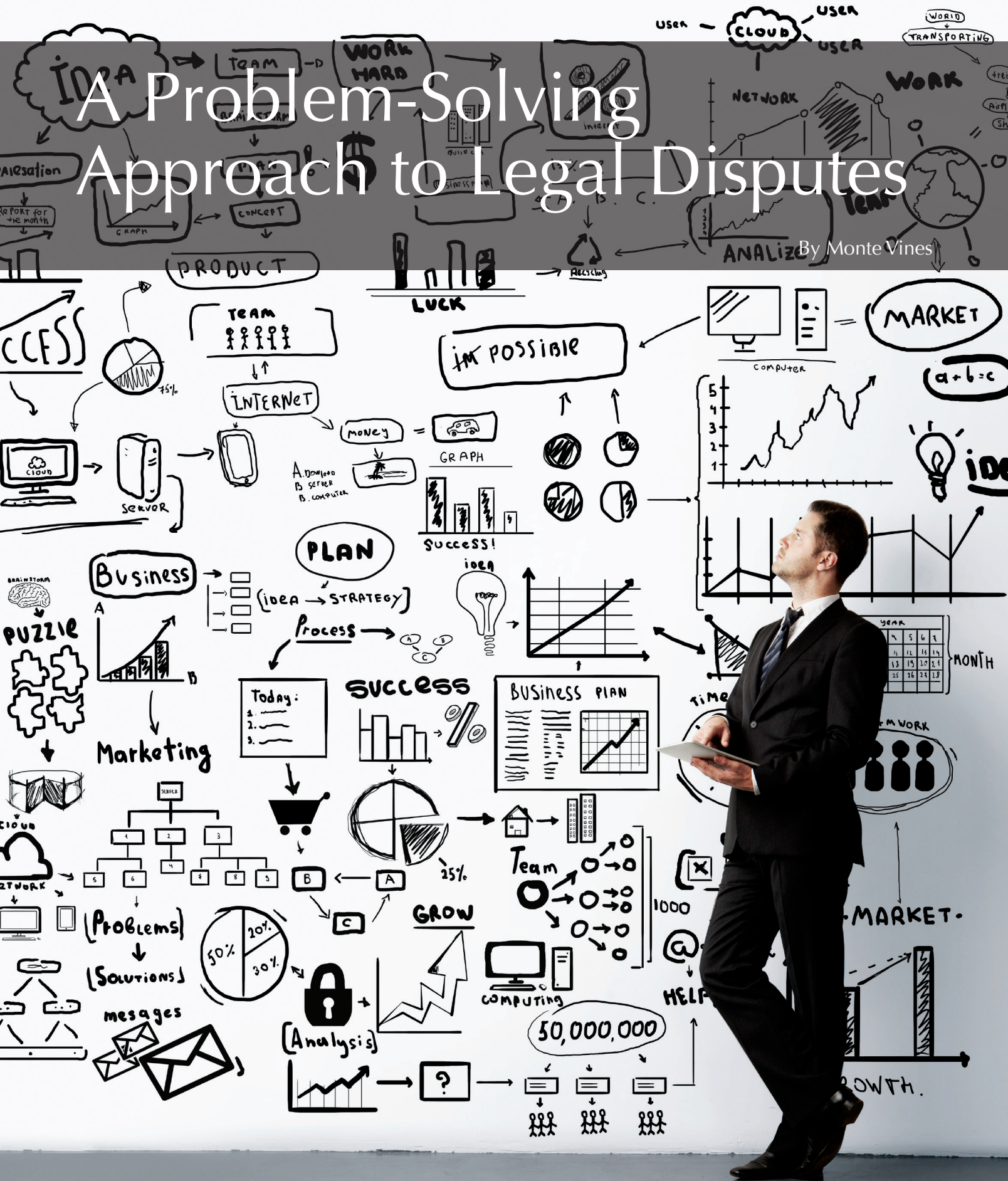


A Problem-Solving Approach to Legal Disputes

By Monte Vines



The ultimate way to resolve a dispute in our legal system is by a trial in court with a resolution imposed by a judge or jury. Litigation lawyers are trained in trial practice, and many resources are available to develop our trial skills. But in over thirty years of practice, I have rarely had a client who particularly wanted to resolve their dispute by a trial. They want a good resolution, but typically they want to get that resolution with as little delay, risk, stress, and expense as possible.

While the right to a trial is a fundamental part of our justice system, trials have inherent costs and risks. It can take a long time to get to trial. Trials can be expensive. They can be stressful on everyone involved. And it is risky to turn the resolution over to others who may not see things the same way your client does. So it is no wonder that the vast majority of legal disputes get resolved without a trial, and that many disputes are resolved without a lawsuit ever being filed. But while agreed resolutions are the norm, people often put themselves through unnecessary grief, expense, and missed opportunities getting there.

Litigation lawyers can provide a great service to clients by helping them achieve good, timely, and cost-effective resolutions of their disputes. But that can be quite a challenge. The disputing parties typically have interests that are differing or even diametrically opposed. Yet they would need to reach an agreement. And as one party's lawyer you would represent only one side of the dispute, an inherent limitation on the impact of your advice or influence.

Two Approaches

There are two general approaches to achieving a resolution by agreement. One is to view litigation like warfare—figuratively fighting it out with the adversary. With that approach, the procedures for litigation are weapons for backing the adversary into a corner and forcing them into a settlement, making them run up the white flag of surrender and agree to your client's terms for a resolution. Sometimes that works, but often it becomes a drawn-out, expensive battle without the desired capitulation.

An alternative is to approach a legal dispute as a problem to be solved. Problems are solved when people apply their skills, resources, and persistence to figure out ways to work through them. When litigation is viewed that way, legal rules and procedures are seen as tools to be used skillfully to work through the dispute to achieve a satisfactory resolution.

The problem-solving approach has some obvious potential advantages. If the parties find a way to work through their legal dispute they can get to a resolution faster, with less expense, with control over the outcome, and even with the possibility of a continuing relationship between the parties. But it can be a challenge to apply a problem-solving approach to a legal dispute, for it requires genuine engagement from the parties. That can be hard to get from people who may be seriously hurt or angry, and who may deeply distrust or even despise their adversary.

There is no one "right" approach to resolving legal disputes. Disputes often arise from human relationships, which are highly variable and sometimes volatile. Every dispute is unique in some respects—the parties, the facts, the circum-

stances, and even the lawyers. So what works in one dispute may not be effective in another.

In my experience, however, the potential advantages of the problem-solving approach and the potential drawbacks of the warfare approach usually weigh heavily in favor of taking the problem-solving approach. The roadblocks to effectively applying that approach can often be overcome with skillful and persistent use of several key practices.

A Problem-Solving Approach

Here are 21 key practices that make up a problem-solving approach to resolving legal disputes. They can help achieve good, timely, and cost-effective resolutions for clients.

1. Maintain your objectivity

A lawyer's objectivity in analyzing disputes is one of the most valuable things we can provide to our clients. Clients often cannot be objective in the midst of their dispute. They need their lawyers to be objective for them. If we allow ourselves to identify so much with our client's dispute that we take it personally we can lose our objectivity. If we start to view the dispute as a contest between the lawyers, or if we take personal offense from some litigation tactic of the opposing lawyer, we can lose our objectivity that way as well. Our objectivity can be difficult to maintain, especially if we have a close relationship with the client or if we have the case on a contingent fee basis, putting our own finances at risk. But our objectivity is just as important in those situations. So while you should be a skilled advisor and a determined advocate for your client, it's still your client's dispute, not yours.

2. Keep your lines of communication open

It can be difficult for the parties involved in a legal dispute to communicate well with each other. They are often angry, frustrated, worried, or hurt, or feel betrayed by the other party. The dispute may pose a profound risk to their finances, their business, their sense of security or to relationships that are important to them. But it is very difficult to work through a legal dispute and achieve a good resolution without open communication between the parties. Because it's your client's dispute, not yours, you should be able to communicate openly and professionally with the adverse party or their lawyer.

3. Help your client to not view the other party as an enemy (unless they really are)

The parties in a legal dispute often view each other in very negative ways. They may consider the other party to be essentially an enemy, and think they need to defeat their enemy in order to prevail in the dispute. But it is very difficult for enemies to constructively work through a dispute to a good resolution. Encourage your client not to see their opponent as an enemy, by your words as well as your actions. That can foster an atmosphere conducive to achieving a good resolution by agreement.

Sometimes your client's adversary really is their enemy, if they are intent on taking unfair advantage of the situation or determined to ruin your client through a legal claim. If that really is the case you need to recognize it and deal with it accordingly. But don't reach that conclusion too quickly, because initial appearances can be deceiving.

4. Recognize the principle of reciprocity

There is a tendency in human nature for a person to reciprocate and treat someone the same way that person is treating them. Recognizing and applying this principle is a key to resolving many legal disputes.

People commonly think they will achieve a better resolution if they come on strong toward their adversary. It's like the idea that "the best defense is a good offense." But a typical reaction when someone comes on strong to them is not to back down but to come on strong or stronger in return. This often ratchets up the dispute rather than moving it toward a resolution.

But the principle of reciprocity applies in the other direction as well. If you want the other party to respect the rights and equities of your client in a dispute, demonstrate to them that you and your client respect their rights and understand any equities in their favor. Making a statement that clearly and genuinely recognizes the other party's rights can be a powerful way to get a constructive dialogue going. Most people think of themselves as fair-minded. If you demonstrate to them that your client is concerned for their rights, they may reciprocate by expressing concern for your client's rights as well. Sometimes the distrust between the parties runs deep, and you may need to do this several times and in a variety of ways before the other party will start to think the concern may be genuine. So be patient and persistent in doing this.

Demonstrate respect not only for the opposing party's rights but also respect for them as a person. Many disputes have a dimension that goes deeper than the particular facts of the case, and involve the parties' gut-level sense for the kind of person or organization their adversary is. Their lack of respect for each other at that level can be a serious obstacle to working out an agreed resolution. Effectively demonstrating respect for the adversary can have a powerful reciprocal effect on the adversary's view of your client.

5. Watch your language

Consider the kind of language you use in communicating with the adversary or their lawyer. If you want to foster a problem-solving atmosphere, use language that reflects that desire, rather than demeaning, distrustful, insulting, or sarcastic language. Lawyers can be masters at crafting sarcastic or demeaning phrases and peppering their communications with them. But language like this is rarely seen by the opposing party as a fair description of them or their position. It is

often taken as confirmation that the lawyer using language like that—and the lawyer's client—are untruthful, unfair, or mean-spirited. It tends to drive the parties further apart and harden their negative feelings toward each other.

You can use respectful language communicating a desire to work through the issues without any prejudice to your client's position if the effort fails and you need to have a judge or jury resolve the dispute.

6. Make sure you have your facts straight

Many disputes arise from a misunderstanding of the facts by one or more of the parties. Getting the parties to a common understanding of the facts makes reaching a good resolution much easier. But before addressing perceived misunderstandings by the adversary, do what you can to confirm your own understanding of the facts. You probably got your initial explanation of the facts from your client. But it is common for people to jump to conclusions or make assumptions about the facts, expecting that they or their employees did what they should have done and that the "fault" must lie with others. Invest time and effort in confirming your understanding of the facts. Get the documents that are involved and review them carefully. If possible, interview multiple witnesses to the relevant events. You may need to get some of the documents and information from the adversary, so be willing to ask the adversary for them.

7. Know what legal footing you stand on

Many disputes arise from a misunderstanding of the parties' rights and obligations under the law or under their contract. Getting the parties to a common understanding of the law or the contract will often help achieve an agreed resolution. If the dispute arises in an area of the law you are very familiar with and no unusual issues are presented you will have this covered. Otherwise, invest time and effort determining or confirming the law or the contract terms that will govern the dispute. The law is so extensive that no lawyer can already know it all, even within a particular area of practice. Once you have confirmed the legal principles involved for yourself, then you are in a position to address any misunderstanding the other party or their lawyer may have.

8. Understand your adversary's position

Make sure you understand the adversary's position and the basis for it. If you don't, your communications with the adversary may never really address what they consider important. In order to work through the issues, you need to deal with them squarely. If you are not sure you understand the adversary's position and the basis for it, be willing to ask them to clarify it for you.

9. Be candid with your client about both the strengths and weaknesses of their position

Lawyers often find it easy to advise clients about the strengths of their position in the dispute. Clients like hearing the points in their favor. But one of the most valuable things lawyers can do for their clients is to advise them candidly about the weaknesses in their position and the strengths in the adversary's position. It can be difficult to deliver advice the clients may not want to hear, but they need to have your best advice on this. Unless clients have a good understanding of both the strengths and weaknesses of their position in the

dispute, it is difficult for them to make a wise decision on what a good resolution of the dispute would be.

10. Speak the truth

Nothing shuts down progress toward a good resolution like discovering that one's adversary is lying about something. If a party is found to be lying about one thing, it can put everything else they say in doubt and undermine any sense of good faith in the discussions, making a good resolution much harder to reach. So counsel your client about the importance of being truthful in statements made to their adversary or information provided to them. In legal disputes, the truth is a very powerful tool. So use it liberally and treat it with care. It will usually pay dividends.

Recognize that people are often very distrustful of their adversary's lawyer, expecting that the lawyer is out to take advantage of them. So they are often suspicious and skeptical of anything the lawyer says or does. Careless use of language by a lawyer may easily be seen by the other party as an outright lie, confirming their initial suspicion. It is just as important for the lawyer to be careful with the truth in statements to the adversary as it is for the client. Earn the belief of the adverse party through careful and consistent use of the truth.

11. Regularly reconsider your client's position

It is not at all uncommon for a lawyer's initial analysis of the parties' positions in a dispute to change as they go through the process of dealing with it. They may learn some additional facts that change the picture substantially. Or they may gain a different understanding about some of the facts. They may discover a statute or legal principle or contract term that they didn't know about initially or didn't realize would apply to the dispute. So, regularly reconsider your analysis of your client's position in the dispute to make sure it reflects any new information.

12. Have some humility

Because it is common for your understanding of the dispute to change as you go through it, approach the resolution process with a healthy dose of humility. Being strident in declaring your analysis of the dispute sets you up to look foolish or intransigent if new information undermines your analysis. It can send the message that you are not interested in a genuine discussion of the issues. But displaying some humility in discussing your analysis of the dispute with the opposing lawyer can often generate a reciprocal openness to a genuine discussion on the part of the opposing lawyer.

Here are some simple suggestions. Rather than saying "The fact is that ...," consider using "I understand that ..." or "I am informed that ..." or "My client believes that ..." Instead of "Under the law, my client is entitled to ...," try "Here's how I see it at this point. ... If you analyze it differently let me know and we can discuss it." Those approaches that reflect some humility do not come across as weakness if the substance of what you have to say has merit. And language acknowledging that you may not have all the facts yet or that invites an alternative analysis by the other party's lawyer sends a strong message that you want to work through the issues to a fair resolution and are willing to collaborate with the other lawyer to get there.

We all want to be seen as having a strong position when discussing a resolution with our adversary. But a strong position

carries its own weight and doesn't need to be shored up with strong language. Posturing by using strong language can give the appearance that it is being used in an attempt to disguise a weak position, or that the lawyer using it has yet to really analyze the dispute.

13. Lay your cards on the table

If you know some good fact or have an analysis of the dispute that favors your client, it is often helpful to share it with the opposing lawyer as soon as possible instead of holding it back for later use. Few cases make it to trial, so if you want that fact or that analysis to influence the resolution that the parties can achieve without a trial, make it known to the other side early in the dispute when it can have the most influence. Occasionally it can be useful to hold a good fact for use in deposing a party or a witness, but you can often get more value out of it by sharing it early. Any genuine discussion of the dispute with your adversary should include your best facts and your best analysis.

14. Do your best to have a good relationship with the other lawyer

Just because the parties are at odds with each other and may dislike each other in the extreme, does not mean that their lawyers need to have a bad relationship as well. In fact, if you can create or maintain a good relationship with the opposing lawyer, you can often use that to facilitate a good resolution of the parties' dispute. It may help you obtain information or documents from the other party with less time or expense. It may make it easier to have a genuine discussion of each party's analysis of the dispute. It may also assist in getting to a candid discussion of resolution options.

And there's no reason that maintaining your good relationship with the opposing lawyer should keep you from discovering the flaws in the adversary's position or from being an effective advocate for your client. In my experience, lawyers generate more respect in the eyes of opposing counsel and enhance those relationships by doing a great job of representing their clients in the dispute.

You do not have to be friends with, or even like, the opposing lawyer to have a good relationship with them. Treat them professionally and with good faith, respond to them timely and substantively, and be willing to engage with them in genuine discussions of the issues. This is a large part of a positive relationship.

When you encounter a particularly difficult opponent, remember that the rule of reciprocity applies to the lawyers as well. If you treat them with respect, deal with them in good faith, and maybe even express genuine interest in them personally, they may eventually reciprocate and allow you to create a workable relationship with them. It may be a challenge to develop a good professional relationship with them, but if you are up for trying to meet that challenge it can help your client get a good resolution of their dispute.

In working through a dispute, the opposing lawyer may say or do something that strikes you or your client as being untruthful, untrustworthy, unfair, unethical, or even in bad faith. Rather than quickly conclude that a problem-solving approach to the dispute cannot work and that you need to switch to warfare mode, have some patience with them. It

is easy in disputes to misinterpret what the other side says or does. It may be an innocent or careless misstep with no bad faith motivating it. And you usually do not know what is going on in the adversary's lawyer-client relationship. For any number of reasons, the lawyer may have a difficult or challenging relationship with their client, and may say or do things differently than they would with a different client. Or something totally aside from the case may be exerting pressures on the lawyer, like family, health, or financial problems.

Even if you don't intend it, *you* may say or do something in dealing with a client's dispute that strikes your opponent as untruthful, unfair, or unethical, or as an indication that you are taking a warfare approach to the dispute. If you realize that you have unintentionally given that impression to your opponent, be willing to apologize for the misstep and correct that impression. None of us is perfect, and any lawyer can take missteps in how they handle disputes. A simple and timely apology can go a long way toward maintaining, or restoring, a good relationship and getting the dispute back on track toward a good resolution.

15. Deal with it sooner rather than later

Disputes rarely get easier to resolve with age. Memories fade. Evidence dissipates. Positions can harden. It is usually easier to achieve a good resolution when the parties and their lawyers diligently pursue it at the outset. It's not uncommon for one party to be eager to deal with the dispute while the other party would like to put it off as long as possible. If you find yourself dealing with a recalcitrant opponent, be persistent in making overtures to explore a resolution. Use an upcoming deadline or event as a reason to try again. The ultimate deadline is the trial date, and many disputes get put off until close to trial to get resolved. But interim deadlines offer more immediate reasons to explore resolution options in order to avoid the expense or challenge of meeting the deadline. They include any step in the litigation process, like the answer deadline, deposition dates, a pretrial conference, or even a deadline you may impose to file a lawsuit.

While some clients push their lawyer for a quick resolution, others will defer to their lawyer's perceived busy schedule and be patient while the lawyer handles it at their own pace. Don't let the patience of your client be a reason for you to put off pursuing a resolution with diligence. Your client's patience does not indicate that they are pleased with the delay, and you would be doing them a valuable service if you take advantage of an early opportunity to achieve a good resolution.

16. Be realistic and creative

You and your client need to understand the practical position both parties are in – financially, operationally, personally, etc. Those are the surrounding circumstances that can have a major impact on the resolution options. For example, the adverse party may have the ability to finance expensive litigation that your client lacks. Even though the facts and the law support your client's side of the dispute, if the other party has practical advantages, your client may not be able to obtain the theoretically just resolution. Likewise, if the other party has practical limitations on what they can offer, your client simply may not be able to get the particular resolution they should have. But there may be very different ways to resolve the dispute that are possible for the adversary to accomplish. Be willing to “think outside the box” and consider other options. The freedom to craft a creative resolution is one of the great benefits of resolving disputes by agreement.

17. Help your client consider the costs and recognize the risks

The value of a possible resolution can only be judged in light of the costs and risks of not resolving the dispute that way. So your client needs to understand the likely costs and risks of continuing the dispute and seeking a more favorable resolution. Be as realistic as possible with your estimate of the fees, expenses, and time and effort involved in pursuing a different resolution. Discuss whether there are relationships between the parties that might be preserved or repaired through some agreed resolution rather than being further damaged by pursuing a more advantageous resolution or destroyed during a hard-fought trial. Be candid with your client about the inherent risks of going to trial. Explain that it puts the resolution in the hands of others – others who may not see things the way your client does, who can't possibly know your client's situation as well as your client does, and who won't have the flexibility to come up with creative solutions.

18. Make your litigation tactics consistent with your resolution tactics

If a lawsuit has been filed, you are faced with the challenge of trying to achieve an agreed resolution at the same time you are litigating the case and preparing it for trial. If your litigation tactics are inconsistent with your problem-solving tactics, you can seriously undermine your ability to achieve an agreed resolution. So consider carefully how you approach the steps you take in the lawsuit. Do the claims or defenses asserted have a solid basis in law and fact? Is there a sound argument for the amount of damages sought? Does your answer admit allegations about which there is no real dispute, so as to narrow the dispute to the real issues? Is the discovery you issue focused on the facts that need to be developed to understand and prove the case, and does it take a realistic approach to the practicalities and costs involved in responding to the discovery? Taking a “scorched-earth” approach to discovery, or extreme positions in claims or defenses, can poison the atmosphere for an agreed resolution and is usually unnecessary for effective trial preparation.

If possible, use the procedures and tools available in the lawsuit to help work through the issues that stand in the way of an agreed resolution. If the parties view the facts differently,

the discovery tools of a lawsuit can be used to develop the facts. If the parties understand the law differently, consider filing a motion to obtain a ruling on the legal principles involved. In those ways your litigation tactics can support your efforts to achieve an agreed resolution rather than undermine them.

19. Hear out the opposing party

Parties in a dispute often have a strong desire to tell their story and be heard. They would usually get that opportunity at a trial by testifying on the witness stand. Giving them an opportunity to tell their story and be heard can be just as important to them in being able to agree to a resolution instead. Sometimes that can be accomplished through informal discussions or through correspondence between the lawyers. If a lawsuit has been filed, a good opportunity for that would be taking that party's deposition.

There are several approaches to taking a party's deposition. Unless there is a good reason not to, consider using the party's deposition as an opportunity for them to tell their story and be heard. Ask them all about the facts of their claim or defense. Do it respectfully. Really hear them out on it. Unless it just isn't true, consider how you can use what they have to say to craft a proposed resolution that would be consistent with your client's interests.

20. Know the adversary

Find out what you can about your client's adversary. If you can understand who they are, what their life is like, and what motivates them, it can help you propose a resolution they would be willing to agree to. If the adversary is an organization, try to learn its values or ways of doing business, as well as the identity of the decision-makers for the dispute.

Your client may personally know their opponent, and possibly know them very well. While information on the adversary from your client is certainly important, it is often a good idea not to rely solely on that. Your client may, understandably, have a biased view of their adversary.

There are many ways of learning about the adversary, including the straightforward ways of asking them at their deposition, or asking their lawyer in informal discussions of the case. Interviews or depositions of others who are involved can be a source of good information about the adversary. Online research, including social media sources, can sometimes produce helpful information about them. While it is possible your research into the adversary could produce some negative facts that could be used to undermine their position in the dispute, just having a better understanding of who they are will help you propose a resolution they would be willing to accept.

21. Make a compelling case for your client's position

Be a determined advocate for your client. Take a realistic position that is well-supported by both the facts and the law, and then make the case for that position by a compelling presentation to the adversary's lawyer. You may need to do this issue by issue as you work through the dispute. If you want the adversary and their lawyer to entertain your arguments, be willing to reciprocate and fully consider their arguments as well. Challenge your opponents on any flaws or weaknesses in their position, and be ready to defend your position with good arguments.

Taking a problem-solving approach to the dispute by applying the key practices presented here will often create favorable conditions for your client's position to be persuasive.

Conclusion

Achieving a good, timely, and cost-effective agreed resolution is usually not as dramatic or exciting as going through a trial. But most clients appreciate getting their disputes resolved without the drama and excitement, or the costs and risks, of making a judge or jury resolve it for them. And while no single approach will work for all disputes, lawyers can often provide great value to their clients by effectively using these key practices that form a problem-solving approach to legal disputes. ■

About the Author



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