

LITIGATION—FIGHTING IT OUT OR WORKING IT OUT?

By Monte Vines

There are two very different ways to resolve legal disputes, and to view the entire litigation process. Which approach should you take?

Litigation as Warfare

Some people approach a legal dispute like it's a war to be fought. In a war, weapons and military strategy are used to try to defeat an enemy and achieve the objective. When a legal dispute is viewed this way, legal rules and procedures are seen as the weapons to win the dispute by defeating the other party. The battlefield would usually be the courts, and the victor would end up with a judgment in their favor, sometimes after a hard-fought trial.

Litigation as a Way to Solve a Problem

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

The Pros and Cons

Winning a legal dispute after a hard-fought battle can certainly be a good, definitive resolution. But battles are often expensive and time-consuming, frequently cause collateral damage, and can have long-term consequences for those involved. I've seen legal victories that are somewhat hollow in light of the costs and the consequences of the fight. And of course I've seen legal battles that end in mixed, muddled, frustrating or adverse results.

The alternative, problem-solving, approach has some obvious potential advantages. If the parties find a way to work through their legal dispute there is a real potential to get to a resolution faster, with much less expense, with the possibility of a continuing relationship between the parties and even of achieving that elusive goal of a "win-win" solution. But this is no panacea. Working through legal disputes can be quite a challenge. They often have no easy solution and no possible "win-win" solution.

The Roadblocks to a Problem-Solving Approach

Despite the potential advantages of a problem-solving approach to legal disputes, several roadblocks may stand in the way. Here are three of them.

First, it requires buy-in from both sides. You cannot unilaterally engage in problem-solving with an adversary who is determined to be at war with you, or who refuses to engage with you to try to work through the issues.

Second, parties in a legal dispute are often angry with, distrust or even disdain those on the other side of the dispute. I've heard some clients describe their adversaries in a wide variety of negative ways, and they may hold those feelings deeply. And I've seen their adversaries hold similar feelings toward my clients. But problem-solving requires some level of real engagement between the adversaries toward a potential resolution they can both live with—a real challenge when the atmosphere between them is poisonous.

Third, many people believe the stronger they come on to their adversary the better the outcome will be for them. It's the idea that "the best defense is a good offense." But legal disputes are not sporting contests. They are disputes between people, and human nature must be considered. Reciprocity is part of human nature. If you come on strong to your adversary in a legal dispute, their typical reaction is not to back down but to come on strong, or stronger, to you. This often ratchets up the dispute rather than moving it toward a resolution.

Overcoming the Roadblocks

Despite the challenges, the roadblocks can often be overcome. Demonstrating to your adversary a willingness to engage in a good-faith effort to work through the issues is important. This can be done without prejudicing your rights in case the effort fails and you need to have the court resolve the dispute. And persistence is often required as well. I've seen many disputes resolved only after multiple efforts.

A problem-solving approach to legal disputes is not just a matter of compromise. You could almost always compromise away your position to the point that your adversary would agree. But that approach rarely would achieve a good resolution from your perspective. Nor does it require that you figuratively hold hands with your adversary and sing Kumbaya. Instead, it requires identifying the real issues and the practicalities of the dispute, and dealing with them in realistic ways.

A legal dispute is a dynamic situation, and you aren't in control of how your adversary approaches it. If they are committed to viewing it as a war and defeating you,

then recognize that and deal with it accordingly. And some disputes are less amenable to a problem-solving approach than others. But if the parties and their lawyers are willing to approach the dispute as a problem to be solved, and use the legal tools in ways that help work through the issues, they can often create an atmosphere conducive to problem-solving and achieve a good resolution.

It's your dispute. Do you want to be fighting a war and trying to defeat an "enemy," or working out the problem and achieving a good resolution?

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