



Is There a Role for Negotiation in Legal Strategy?

The explosion in legal costs and the collateral damage to business and society have become major topics in the news over the past few years. Here are a few recent headlines from international business magazines: 'You Sue, You Lose: The High Cost of Litigation' (CIO-Asia, May 2004), 'Ireland Introduces System to Reduce Litigation over Workplace Injuries' (Business Insurance, 7 June 2004), 'Courting Disaster' (a special issue of Risk Management magazine, February 2004), and, perhaps most chilling, 'Can You Trust Your Lawfirm?' (Harvard Business Review, November 2002).

'Horror tales of lawsuits rival anything in a CEO's nightmare,' writes CEO magazine. 'Despite repeated calls for tort reform over the last 20 years, the litigation vampire roams at will. Is it time for business to choose a different stake?'

These articles reflect a growing anxiety among businesses in the developed world about the rising tide of lawsuits eating away at their bottom lines, working relationships and very future. Their worries are not unfounded. In the US alone, where such figures are most available, tort costs in 2002 reached US\$233bn. To put it in context, that's over \$800 per citizen (compared to \$12 per citizen in 1950) or the equivalent of a 5% tax on wages. Yet less than half of that money actually went to the people or companies who won the suits.

Is it any wonder, then, that trust in lawyers is declining and that businesses, governments and public citizens groups are seeking less destructive methods of resolving grievances?

All is not rosy in the legal profession either. As courtroom battle becomes as formalised as a minuet, attorneys find themselves with a very restricted range of moves to offer their clients and thus become trapped into competing largely on price. The result, clearly evident in Singapore, is that the marketing of legal services has begun to resemble the selling of a commodity, with law firms working fewer employees for ever longer hours in an effort to beat one another on costs.

The question is how to break free from this self-destructive spiral. The answer, more and more are now arguing, is to have the capability to offer a variety of remedies and the confidence to do what the legal profession was created to do: advise clients on how they can achieve an optimal outcome. Just as a doctor no longer heads to the operating room just because her patient asks her to make the hurt go away, but instead will consider a wide variety of measures — including physical therapy, changes in diet and lifestyle, etc — so a lawyer does not need to initiate proceedings every time a client comes through the door with a grievance.

Whether it be in the areas of dispute resolution or deal-making, nearly all of the alternative legal 'therapies' involve negotiation. Done well, negotiation is not only more cost-effective than litigation, but can produce results that are more advantageous to clients, even in disputes considered to be one-off distributions.

Take a simple contractual dispute, for example. If you are suing for \$150,000 and have a 50:50 chance of victory (considering everything from complete loss and payment of costs to the other side to total victory for your client), and if you assume the cost of litigating the case through to judgment is \$50,000, then the true value of the case to your client is, on average, only \$25,000 $[(150 \div 2) - 50]$. The sooner you can begin negotiating that case to bring down the legal costs, the more your client will gain, even from a slightly smaller award. But that isn't the only gain. Your client benefits from quicker resolution, less stress and a greater likelihood of payoff. Why the latter? Because while a court trial puts the decision in the judge's hands, with both sides fighting on purely legal grounds, with the consequent risk that your client will lose, a negotiated settlement is essentially a business decision over which you retain control of both the process and, to a far greater extent, the outcome. A stronger likelihood of victory will come from a good negotiator's ability to keep the other side mindful that, in business, time, reputation and relationships are money.

Maintaining reputations is an important area where negotiation can offer a better solution than litigation. Although an angry litigant may start out wanting his 'day in court', no one, including the plaintiff, benefits from a public airing of his dirty laundry. Think of the tragedy of Oscar Wilde, whose libel suit against the Marquis of Queensbury ended in victory, but left his reputation in tatters. Now imagine the value of maintaining its image to a business which has spent tens or even hundreds of thousands of dollars to develop its brand name, create business partnerships and build customer loyalty. Negotiation strategy becomes a vital component in creating an out-of-court solution that will best preserve the interests of your client.

On the deal-making side, when drafting contracts, an astute counsellor's job is not merely to review the terms for legality and enforceability, or even to assure that the financial arrangement tips in favour of the client, but to ensure that the two sides have also created the foundation for a productive and lasting business relationship. That means not dividing up the pie, but exploring both sides' interests (needs, wants and concerns) and putting together a creative negotiation strategy that actually expands the pie so that it can satisfy all of the contracting parties. This is not a pious aspiration, but rather is both a social and economic ideal as well as a quite practical, hard-headed necessity, because relationships only function properly when there is a sense of fairness and mutual exchange of value.

This brings us to the key value of a good negotiated settlement: it is self-enforcing. It works because both sides believe it is in their interest to make it work, not because the contract stipulates it, a judge has ordered it, or the police enforce it. This is especially important in international agreements and disputes, which always carry an inherent risk of instability and where standard legal enforcement often proves impossible. In international transactions, the negotiator-lawyer's job lasts through well beyond the drying of the ink on the contract. Negotiation becomes a fundamental tool not merely for creating a relationship, but for managing it and, inevitably, for mutually and effectively resolving the disagreements that will ensue as a natural course of business.

The flaw in approaching law from a purely adversarial viewpoint is that it is not necessarily the most effective method for pre-empting or resolving problems. In terms of cost, reputation, relationship and enforceability (particularly across national boundaries), interest-based negotiation — backed up, if need be, with the powerful threat of lawsuit — holds the promise of even greater rewards. If lawyers begin from the assumption that their fundamental task is to get the best possible outcome for their clients, then negotiation strategy very much deserves a prominent place in their professional repertoire.

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