Feature Article

See the Problem, Solve the Problem

by Jonathan B. Frank

As litigators, we are trained to see legal problems a certain way. We are also trained to see solutions to those problems through an "I win/you lose" prism. Not that there's anything wrong with that, at least sometimes. But if we can step back from our training for a minute, maybe we can see the problem differently. And maybe, if we see the problem differently, we can see a different solution. And if we can see a different solution, and truly be problem solvers, we might end up with clients who will thank us for helping them out with a difficult situation, instead of grumbling (often rightfully so) about the cost and uncertainty inherent in the litigation process.

Describing the Problem

What I'm suggesting is that we first try to find out what kind of problem we're dealing with. I have tried to categorize some of my cases, and I believe that if you do the same, you may find some of the same categories. For example, it seems to me that there are four common types of business disputes.

"It's the Principle of the Thing"

Sure, we hear this all the time, and sometimes clients really do mean it. Mostly, these cases involve common and repeated issues that are central to the operation of a business, such as hiring and firing issues or trade secrets/confidentiality/intellectual property issues. A client may want to create or enforce policy, no matter what the cost. These cases are not usually susceptible to easy settlement, since the parties often have fundamentally different policy concerns. An employer seeking to enforce a covenant not to compete, for example, will likely file a complaint and proceed at least through the preliminary injunction hearing. At the same time, the employee does not usually have the luxury of reaching a settlement. So off to court we go, at least for now. Still, once you understand the competing policy considerations, you can help guide your client through the process and explain why the trip to court may be inevitable.

"Who Screwed Up?"

These are cases involving performance deficiency, such as overpromised goods or services ("blame the sales guys") or quality control problems ("blame the shop guys"). A part was not designed to specifications. A shipment was delivered late. These cases often involve some objective criteria often the subject of expert testimony – and fairly basic contract interpretation issues. While at first these fact-based cases are difficult to resolve, once all the relevant information is collected and analyzed, it is likely that reasonable business minds would conclude that a settlement is better than leaving a decision in the hands of a third party, whether that's a judge, jury or arbitrator. Our job in these cases should be to collect and objectively evaluate all the truly relevant information (note that I did not say, "all of the information that we can possibly collect in discovery"), keeping in mind that the legal principles governing the case are probably relatively simple. One important consideration here is how to explain to a business client that someone within its organization might be responsible, in whole or in part, for the problem.

"They Can't Do That to Me"

These cases involve the crisis of misperceptions, such as many partnership/corporate disputes or cases with ambiguous (or non-existent) written contracts. These cases turn on a determination of the legal rights that will govern the parties' conduct, which are often at odds with the parties' expectations based on ethics, a sense of justice, or watching lawyer shows on TV. Many times these cases move to the summary disposition stage before settling, but once the legal issues have been resolved (or counsel can give sound advice about the likelihood of prevailing), a resolution can be reached. Our job in these cases is often to take a set of facts that may be agreed-upon and craft the best legal argument. We must be on the lookout, however, for the compromise solution that can percolate up through the process as both sides come to appreciate the uncertainties of their respective positions, and often the fact that both sides may share some blame for the dispute, possibly for failing to anticipate a future event.

"It's Just About the Money"

Finally, to be fair, there are cases where it's "just about the money," such as valuation or collection cases. The goal here is clear: get the most, or pay the least, and minimize the fees in doing so. One party, usually the defendant, wants to hold the money as long as possible. These cases get resolved when the leverage points (costs, time, aggravation, case evaluation, taxes due tomorrow) create opportunities for both sides to hesitantly accept a dollar figure that neither likes. Unlike the cases described above, there may not be any deeper principle or cause for the dispute.

These four categories are, by definition, oversimplified. Categorizing a problem is useful, however, because it can move us toward a solution. To help us categorize the problem, we need to ask: Why is there a dispute? What's really going on? Even though we're not necessarily trained to do this, it can be easier than it looks. There are usually several, often overlapping, explanations. These include, but certainly are not limited to:

- Legitimate disagreement about principle/value
- Misunderstanding earlier in relationship
- Misperceptions
- Misunderstanding of present legal rights
- Dishonesty/deception
- Unequal positions of power
- Revenge/retribution
- Deterioration of relationship
- Shifts in priorities
- Someone's being taken advantage of
- Someone screwed up
- Someone's out of cash

Finding the Solution

Having described the problem, we need to keep in mind some guiding principles of dispute resolution. Believe it or not, people and businesses don't like conflict, and they usually prefer certainty and risk avoidance. To get there, we need to identify their interests and understand what's really at stake. Try this: ask your client to define "success" in your case. You may be surprised to find that your definition of success and your client's definition are not the same. Hearing your client's definition will also put you face to face with a difficult part of what we do: helping your client to be realistic about whether the legal system can generate that "success." If your client wants "justice" based on ethical or moral principles, you may need to explain the limitations of the legal system to accomplish that goal. Likewise, if your client wants to collect five years of lost profits or large emotional distress damages, you may need to explain the rarity of such an award.

Once you and your client have a common goal, the truly relevant facts should be collected and put on the table. Believe it or not, a good way to do this is to put everyone (or at least all counsel) in a conference room together early in the case. Bring in the experts if you think that will help. It may be tense, but that tension is a natural byproduct of the fact that a dispute exists. If you can work through the tension, you can get a lot done. Gathering informal discovery can be a great time and money saver, but if you need formal discovery, you should work with your client to develop a discovery plan that your client can understand – relate discovery to the client's vision of "success" whenever possible. Legal positions should be advanced and, if necessary, ruled upon (cross-motions for summary disposi-

tion are a good way to do this). Although more difficult, explain to your client how these legal issues will affect the case. You will also need to spend some time understanding the other side's interests and goals – this is often challenging by itself, and what makes it more challenging is trying to explain these interests and goals to your client without sounding like you have taken the other side's point of view.

Once the reasons for the dispute (from everyone's point of view) are understood and once the important facts are collected, it is possible that misperceptions can be overcome and common ground can be found. Unrealistic hopes (on both sides) can be transformed into realistic expectations. If there are areas where the parties will have to "agree to disagree," then so be it. But even that process will move the parties closer to resolution. Make no mistake: finding a path to resolution is hard. If it were easy, the parties probably could have done it without you. But this is where your ability to see the problem, with all its intricacies, is the most valuable. Perhaps you can start with small agreements, remain flexible, re-establish a relationship if one existed, and then shoot for the final "win/win," or at least the "not-lose-too-badly/not-lose-too-badly," all the time remaining a forceful advocate for your client's position.

Of course, this won't always work. There are plenty of problems that can only be solved through third-party decision-making. Principles may be so diametrically opposed that they are not capable of compromise. Taking responsibility for the "screw ups" may be so difficult that neither side will do it. Feelings may be so hurt that the differences have become truly irreconcilable. Financial pressures may be so severe that a monetary resolution cannot be found. But not all problems involve such extreme circumstances. Remember, even with a serious problem, our clients would usually prefer to manage the resolution of their conflict instead of leaving it in the hands of someone else (if you don't believe this, bring your client to a motion call).

To be an effective problem solver, you will need to understand all the relevant circumstances in your case – not just the legal authority that each side is relying on. If you look hard enough at what the problem really is, you'll probably find some cases you're currently handling that can be resolved using some form of the method described above. And when you do, your clients may actually thank you.

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