

The Employment Lawyer as Problem-Solver

for

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I. Introduction

My basic premise is that employment lawyers, whether representing employees or employers, can serve their clients best when they address every client problem or dispute first and foremost with a problem-solving mind-set and using problem-solving approaches. That is what I have tried to do in my practice representing employees, and I believe it has worked well for my clients – and my practice.

This paper is a mere introduction to the subject. As mentioned below, many books and articles address the subject in greater detail; I have learned much from reading such materials, and I commend them to other lawyers. Reading such materials has helped me learn not only how to practice better but also how to describe the problem-solving approach to others. Some schools now have courses on problem solving, though they were not available (to the best of my knowledge) when I attended business school and law school. In addition to reading, I have learned much from my own day-to-day experiences solving problems for many thousands of employees over the past 35 years.

Admittedly, much of this paper addresses the subject primarily from the perspective of a lawyer representing employees. The comments in this paper are based on that experience and perspective; that is the prism through which I view employment law practice. I hope and believe, however, that many of the concepts and approaches described here can be relevant and helpful to lawyers who represent employers and to other lawyers in the field of employment law.

II. Background

I was trained as a litigator in the adversarial system. I clerked for a federal district court judge (1974-1976). After a stint as a law teacher, I became a commercial litigator, starting in 1979. I gradually became an employment litigator, representing exclusively employees since 1990. I learned to use the weapons of war to win in court, and I became good at it – though I had my share of losses.

I gradually learned that litigation, though necessary in our justice system, can be an ineffective, costly, and unjust way of solving problems and resolving disputes for my clients. So, I started learning ways of solving problems and resolving disputes without litigation, pre-litigation, and outside litigation. I read “Getting to Yes” and “Getting Past No” and other books and articles on problem-solving, negotiation, and alternative dispute resolution. I learned how to negotiate for my clients’ interests in the absence of legal claims and/or before asserting legal claims and how to serve my clients’ interests through mediation of disputes. Eventually, I stopped considering myself a litigator (though I continued to litigate when appropriate). Instead, I began to consider myself first and foremost a counselor and problem-solver – helping my clients solve their problems using the most appropriate tools in my toolbox.

III. The Employment Lawyer's Job

As a practicing lawyer, my primary duty and responsibility is to serve my clients' interests, consistent with legal and ethical standards. This is a client-centric approach. Everything I do must be measured by that yardstick.

Clients come to me with problems. Those problems may or may not entail legal rights and claims, and they may or may not be susceptible to resolution through the judicial system. In any event, my job is to help them solve those problems, using my knowledge, skills, experience, and judgment. Although I know how to recognize, develop, and litigate legal claims, litigation typically is not the first or best way to begin to address a client's problems. As the saying goes, when the only tool one has is a hammer, the world appears full of nails. Good lawyers must acquire and use other tools to serve their clients, using their hammers only when necessary.

Employment law is particularly well-suited for a problem-solving approach. The relationship between employees and employers is mutually dependent. People need jobs to support themselves and their families; and jobs and careers are important to the identity and the self-realization of many people. Employers need employees to achieve their purposes. Obviously, the employment relationship is fraught with opportunities for problems and disputes. To serve their clients well, the lawyers who advise and represent them must develop the mind-set and skills of problem-solving and dispute resolution.

IV. The Litigation (or Adversarial) Mind-Set

Our culture and our economy are based in large part on competition and winning. Our judicial system is based on the adversarial process, pitched battles in which the judge (or jury) decides who wins and who loses. In law school, we learn how to be zealous advocates for our clients, including how to litigate on their behalf so as to win the case and beat the other side. There is nothing wrong with that. Until relatively recently, however, most law schools did not teach how to be zealous advocates using tools other than litigation. To use the jargon of negotiation theory, lawyers have been trained to use a win-lose approach to disputes, ignoring possible win-win approaches such as problem solving and dispute resolution. Obviously, litigation has its place. We must have a legal process for resolving disputes, whether personal, business, or otherwise. Our system is a far better than many systems used in the past and in other parts of the world. But everyone who uses our system recognizes that litigation typically is a blunt instrument that is costly, slow, inefficient, and often unjust; it is especially problematic for those who have limited financial resources. I certainly came to that realization during my practice representing individual employees with employment problems and disputes.

V. Alternative Dispute Resolution

Recognizing the problems with court litigation, so-called alternative dispute resolution procedures (ADR) sprouted up in the field of employment law starting in the mid-1980's.

Various types of ADR have been around for centuries and have been employed in various contexts in the United States; for example, in the labor context, grievance proceedings and labor arbitrations have been used extensively since World War II, and mediation has been used for family and community disputes. We now use mediation extensively in employment disputes, through court-annexed and agency-annexed programs and through private providers and individual mediators. And arbitration of employment disputes has become increasingly common, especially due to court decisions during the past 25 years encouraging use of arbitration (even in the context of pre-dispute forced arbitration agreements).

Notably, the very term “ADR” reveals its roots in the adversarial system. Such procedures are deemed to be “alternatives” to the traditional method of resolving disputes – through litigation. The term ADR suggests that litigation is the primary method of resolving disputes and ADR procedures are merely an alternative to that primary method. In fact, the opposite should be the case – both in practice and in terminology. Litigation should be viewed as the alternative to be employed when other dispute resolution systems are inapplicable or have been tried and failed. Such dispute resolution approaches should be deemed as primary, not secondary or alternative.

VI. The Problem-Solving Mind-Set

Problem-solving can be viewed as a continuum. On one end of the continuum are problems that do not involve disputes with anyone and that may not entail negotiating with a third-party (“primary problem-solving”). In the middle are problems that may or may not involve legal rights or claims and that involve “negotiating” with a third party - whether an informal discussion, a more formal direct negotiation, or a negotiation with the aid of a mediator or other third-party (“problem-solving negotiations”). At the other end are serious disputes involving legal rights or claims that may result in formal legal proceedings to “resolve” the problem (“formal dispute resolution”).

Much of the literature on problem-solving focuses primarily on the problems in the middle of the continuum – problem-solving negotiations. Many studies have been done, many books and articles have been written, and many courses have been taught on problem-solving negotiations, especially regarding the differences between problem-solving negotiations and traditional positional negotiations. That literature is very informative, and I urge my fellow employment lawyers (particularly those who represent employees) to become familiar with those resources. In addition to such classics as “Getting to Yes” and “Getting Past No” (mentioned earlier), I recommend anything written on problem-solving and dispute resolution by Professor Carrie Menkel-Meadow of Georgetown University Law Center. I have attached at Appendix B a short and incomplete bibliography.

As important as it is for employment lawyers (particularly those who represent employees) to study and master problem-solving negotiations, they also should study and master primary problem-solving techniques.

Given the number of interactions between employees and employers every day, the opportunities for problems are almost unlimited. The vast majority of those problems have nothing to do with legal rights or claims. An employee may have a problem with a boss who is a bully or is insensitive to the employee's perspective or may have a problem with a co-worker who is not doing his job or is a poor team player. An employer may have a problem with an employee who has deficiencies in performance or disruptive personality traits. Such problems typically are not susceptible to solution through formal dispute resolution mechanisms, but they are problems that the parties may want or need to address.

Even more serious problems in the workplace (e.g., disagreements about compensation, promotion, evaluation, or performance) often are not susceptible to resolution through formal legal processes (in the absence of legal or contractual rights). And given the employment-at-will doctrine, employees often have no meritorious legal rights or claims even when they suffer the ultimate employment problem – termination of employment.

All of these situations involve problems in the workplace for employees and employers – and their lawyers. We, the employment lawyers, need to learn better how to help our clients with all of these problems, not just those problems that rise to the level of an open dispute or assertion of legal rights or claims. A problem that is not solved promptly and effectively can lead to an open and contentious dispute and/or to the assertion of legal rights and claims. For employers and their counsel, solving such problems early on is both good human resources management and good legal strategy (i.e., avoidance of disputes and legal claims).¹ For employees and their counsel, solving such problems early on is good for the employee's job, career, and well-being.

For lawyers who represent employees, the problem-solving mind-set affects every aspect of the practice. A threshold consideration for lawyers who represent employees is determining who will become a client. Some employee-side lawyers evaluate and screen prospective clients based on whether the client has a viable legal case: if yes, the lawyer may represent the client; if not, the lawyer will not represent the client.

That approach misses the opportunity to help people with their very real problems even when they have no meaningful legal rights or claims (or they lack the wherewithal to pursue whatever rights or claims they may have). At our firm, we try to determine whether a prospective client

¹ I have attached as Appendix A a short piece I wrote years ago for employers on how to avoid employee lawsuits; that piece suggests some problem-avoidance and problem-solving approaches for employers – and their counsel.

has a problem that we might be able to help solve, without regard to legal rights and claims. As discussed later, the presence or absence of legal rights and claims becomes a factor in developing and implementing a plan of action to help a client solve whatever problems the client came to us to help solve; but the absence of legal rights does not mean that the client doesn't have a problem or that we cannot help the client with that problem.

By training and experience, most lawyers have good analytical skills. Many clients, on the other hand, do not. Even those clients who have good analytical skills typically lack the objectivity and perspective to analyze their own situations effectively. A problem-solving lawyer can provide valuable assistance merely by helping the client think through the problem, identify possible avenues for solution, and decide on a course of action, all without regard to the existence of grounds for a lawsuit.

VII. The Problem-Solving Approach

A detailed discussion of the skills and techniques of a problem-solving approach in the field of employment law is beyond the scope of this paper. The rest of this paper describes the application of some of these techniques in my practice representing employees. Many of the specific techniques are not directly applicable in the context of representing employers. Nonetheless, many of the skills and techniques discussed (e.g., careful and active listening and step-by-step escalation) are applicable; and the problem-solving mind-set certainly is relevant to all lawyers.

A. Ascertaining the client's wants, needs, and interests

The starting point is to understand the problem to be addressed. As the saying goes, if you don't know where you are going, you probably won't get there.

Thus, near the beginning of the initial consultation, we ask the client such things as: Why are you here? What is the problem? What do you want to accomplish? What do you think we can do to help you? What are your goals? If I had a magic wand, what you like to happen (within reason)? Such questions may be asked again later in the consultation or later in the client relationship, as the situation unfolds.

Using the language of problem-solving negotiations, this stage entails beginning to understand the client's wants, needs, and interests, which become the starting point for developing and implementing a plan to help the client. The lawyer needs to ask questions that elicit the client's honest responses, and the lawyer needs to be a careful and active listener. The lawyer must pay close attention to what the client says and does not say and to the client's choice of words, emotional content, and body language. This means balancing the tendencies to think about the next question while the client is talking or to be absorbed in note-taking; while both are appropriate, the lawyer must also remain sufficiently focused on what the client is saying.

B. Gathering and Evaluating the Relevant Facts

The careful lawyer must understand as much as practicable about the underlying facts in order to engage in effective problem-solving and dispute resolution. And the lawyer must evaluate the known facts to help determine the best course for the client.

The primary source of such information is the client. The client often does not understand what is relevant; and in any event, the client invariably will provide only a selective slice of the full story (sometimes deliberately). So, the lawyer must guide the process, asking open-ended and close-ended questions, to elicit relevant information.

In due course, the lawyer must begin to understand and evaluate the other side's version of the relevant facts. In any problem-solving negotiation or dispute resolution, understanding as much as possible about the other side's views is essential. Typically, this entails trying to foster the free and open exchange of information and views with the other side. Of course, the basic principle of reciprocity comes into play: any such exchange must be a two-way street for it to be productive and credible.

Gathering, understanding, and evaluating the relevant facts is an iterative process, beginning with the initial discussion with the client and continuing throughout the course of the representation - until the problem is solved or the dispute is resolved.

C. Evaluating the client and the "case"

Clients come to us for advice, not just for a sympathetic ear. Thus, after gathering information, we must evaluate it and provide legal advice. While listening and occasionally guiding the process with questions and suggestions, the lawyer begins the process of evaluating the client and "the case."

We begin making judgments about the client: Is the person honest, rational, reasonable, and credible? Is this person telling you the story in a straightforward and logical manner? Does the story make sense? What is the person not telling you? Is this person someone you would feel comfortable working with and representing? Does the person have the intelligence, education, articulateness, thoroughness, and analytical abilities to make a good client and witness? How good was the client's job performance? Does the person tend to blame others for everything or to exaggerate things? Are the client's objectives and expectations realistic and reasonable?

We also begin to make judgments about the "case": Has the employee's boss or company acted unfairly? Does the employee have any viable legal claims? What evidence is available or attainable to support (or refute) the claims? Are there problems with timing, such as imminent deadlines or statutes of limitations? What damages has the client suffered? How much money might be recoverable under various claims and scenarios? Are mitigation problems present? Would the claims be convincing to a judge or jury? What are the political and personal factors

that affect what happened? What avenues or forums are available to address the situation? Is resolution a realistic possibility? What attorneys' fees arrangements are appropriate?

The lawyer should explain to the client relevant legal principles and how they apply to the client's situation. The client should understand the strengths and weaknesses of the legal position. To paraphrase a familiar saying, an educated client is the best client.

Of course, as stated earlier, not every problem or dispute is or should be grist for a lawsuit. Clients come to see us with a problem, not necessarily a case. Our role can be that of a professional problem-solver and dispute-resolver, not just that of a litigator. Thus, we should evaluate the situation not just in terms of a possible lawsuit, but also in terms of what we can do to help the client with the problem including analyzing what leverage the client may have. The clients may have leverage because of the positions they are in, the relationships they have, the knowledge they possess or of the timing of the problem or dispute.

D. Developing and Implementing a Plan

In a typical initial consultation, after learning the basic relevant facts and beginning to understand the client's wants, needs, and interests, the lawyer must begin to develop a plan on how to solve the client's problem.

By the end of the initial meeting, the client should have a clear and specific plan – who is going to do what. The next step might be the client gathering more information or the lawyer doing legal research. It might be the client talking with someone at work about the situation or the lawyer making a phone call or drafting a demand letter. Or it might be a conscious decision to do nothing for now, awaiting further developments.

In determining the most suitable strategy and plan of action, counsel should be familiar with tactics, strategies, and methods for solving legal and non-legal problems that arise out of the employment relationship and for resolving disputes that do not necessarily depend on the assertion of legal rights or employing formal legal procedures.

The best initial steps toward addressing many employment problems often involve non-legal approaches, before or in lieu of asserting legal claims. Of course, if such opportunities are unavailable or are unsuccessful, the next steps can be more aggressive. Assertion of legal claims is a necessary alternative (perhaps, a "last resort"), when other mechanisms to solve a problem or resolve a dispute have failed.

I start with the premise that the best overall negotiation strategy usually involves a gradual *escalation of confrontation*. You turn up the heat as and when you need to, but not before you need to. It is a lot easier to escalate confrontation than to de-escalate it; it is usually harder to start peace talks after blood has been spilt in war. Moreover, sometimes our weapons for war are

ineffective or our client wants to avoid war. Although you can start a war in such a situation, that can be a dangerous strategy.

The client's attorney should try to resolve a problem initially through the approach that is the least confrontational approach that has a reasonable prospect of success (e.g., direct negotiations between parties). If this does not work, the attorney should next try more a confrontational or aggressive approach. Gradual escalation is especially well suited for disputes involving clients who are still employed. In that context, the client and the employer have an existing relationship that may be maintained and even enhanced if handled properly or that may be harmed or even ruined if handled improperly.

Consistent with such an escalation approach, the easiest and best resolution of a problem may occur when counsel stays in the background. I often begin the problem-solving process this way because my client can be more effective than I can be, at least at the beginning.

In any negotiation, we need to identify our leverage - the buttons we can push to get what our client wants. As lawyers, we tend to focus on whether the client has a good legal claim to use as leverage against the other side. Too often, however, our clients don't have good legal claims. Even when a client may have a good legal claim, the potential cost of pursuing it may outweigh the potential benefit.

Without regard to the legal leverage our client may have, we should look for what I call "political" leverage. Under the escalation-of-confrontation approach, we can -- and often should -- use our political leverage before we use legal leverage. When no real legal leverage exists (or counsel or the client is reluctant to use it), the default choice is to focus on whatever political leverage the client has.

Political leverage can include guilt, fear, friendship, loyalty, and fairness. Guilt can be a great motivator, given the right employee and the right employer; sometimes, it is useless. Guilt can be especially effective for a long-term employee who is terminated through no fault of his or her own and who is generally well liked; the people making decisions about such an employee may feel very guilty about it. Fear also can be a great motivator - fear of bad publicity (which is too often over-rated by clients), fear of the government, fear of looking bad in the eyes of more senior management if the matter escalates, and fear of appearing unfair or unreasonable. Friendship and loyalty can influence some decision-makers to try to help your client with his or her concerns. Finally, many corporate decision-makers (particularly some line managers and executives) want to be fair, or at least to appear to be fair. This can be a very effective button to push.

Generally, the client can use these political buttons better than the lawyer can. The client can say things to a corporate decision-maker that the lawyer can't say and can push buttons that the lawyer can't push. This is especially true when the client is able to talk face-to-face with the key decision-maker(s); it's harder for the decision-maker to say no to the client when they are

eyeball-to-eyeball. Moreover, a corporate decision-maker will be far less guarded with the client than with a lawyer.

If it does not work, the client can always escalate. For example, in appropriate circumstances, the client might next assert that the employer's conduct is not only unfair but also is illegal and that the client is considering asserting a legal claim. This step obviously might aggravate the employment relationship, particularly between the client and any persons charged with illegal conduct; and it risks retaliation. On the other hand, this step might be necessary to get the employer's attention, to convey the seriousness of the client's position, or to call attention to the employer's risks.

The dynamics of the situation will change once an attorney appears on the scene. The other side will get more defensive. Generally, a company lawyer - or at least a senior human resources person -- will appear. The opportunity to influence the corporate decision-maker directly and to use political buttons may be greatly reduced.

For this approach to work, the client must be able and willing to negotiate on his or her own behalf. Even clients who appear unable or unwilling to negotiate for themselves can be empowered to do so with guidance from the lawyer. The lawyer can start by figuring out with the client who he or she should talk with. Generally, the goal is to identify the person in the company who has the best combination of *power* and *inclination* to help your client.

In preparation for those discussions, the lawyer should coach the client on what to ask for, how to structure the requests, what buttons to push, how to ask questions, how to listen for cues, and how to press the political arguments. The lawyer can develop a basic script containing key concepts, words and phrases to use or to avoid, with various alternative scripts for anticipated scenarios. Also, coaching a client on the right tone to use can be critical to the outcome of the negotiation. The client typically should be firm without being aggressive and sympathetic without being weak.

Then, the lawyer waits for the client to call to report on the discussions. Sometimes, the client will have made substantial progress; sometimes not. If the discussions were successful, the next step might be for the company to prepare a settlement document, which you will review. If the discussions were not successful, the lawyer and the client will figure out together what the next step should be. The next step might be for the client to have further discussions with the same person, with coaching from the lawyer on the approach to use, or for the client to gather more information or to talk with others.

The next level of confrontation is the appearance of the lawyer on behalf of the client. It is rarely advisable to start with a summons and complaint, absent a statute of limitations concern. (Even then, a tolling agreement can buy time.) Generally, the client is best served by having the lawyer open the door for some discussions with the other side.

Even when such discussions do not lead to a resolution, both parties will learn a good deal about the situation. I consider every discussion with opposing counsel to be an opportunity to learn as much as I can about the positions, attitudes, and evidence of the other side, which I then discuss and analyze with my client; the same applies to the other side. This information can help make better decisions about the strengths and weaknesses of the case, about the likelihood of success in any adversarial proceedings, and about the best strategies for settlement and litigation. Thus, even when direct discussions fail, they are usually worth the time and effort involved.

When efforts to solve a problem or resolve a dispute through direct interactions, discussions, and/or negotiations fail, the parties usually should consider ADR approaches, such as mediation and voluntary arbitration. Discussion of ADR is beyond the scope of this paper.

VIII. Conclusion

The employment lawyer with a client-centric approach should approach every representation with a problem-solving mind-set and should look for problem-solving approaches to addressing whatever problems and disputes are presented. The client, whether an employee or an employer, generally will be well served by such an approach.

Appendix A

Prophylactic Measures for Conflict Prevention (Or Top Ten Ways to Avoid Employee Lawsuits)

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A worthy and critical a role for lawyers is to counsel clients in how they might altogether avoid conflict by early identification and handling of nascent disputes. Your practice should include proactive advice, counseling, problem-solving, and negotiation in addition to litigation. Many people do not have good cases or do not want to sue, but they still need help and are willing to pay for it. Moreover, in most situations, litigation is not the best way to solve problems, resolve disputes, or help clients. We, as attorneys, have the skills and experience with problem solving and dispute resolution that can help these clients.

In that spirit, I have created a top ten list of admonitions, or ways for employers to avoid employee lawsuits. In many instances, employees would do well to heed this same advice and save themselves the trouble of engendering bad feelings and disputes down the road.

10. Listen to each other: There may be legitimate complaints or good ideas. In any event, everyone values the opportunity to express themselves and to be taken seriously. This will reduce the likelihood of future problems, and all will feel more invested in a common enterprise.
9. Talk to each other: To the extent possible, keep each other informed of things that affect the job or workplace. Be clear and specific in telling employers when personal matters may affect job performance or when there is a lack of clarity about expectations. Employers should be explicit with employees about what is expected of them, especially when a material change occurs (e.g., new standards or a new supervisor).
8. Routinize performance evaluations: Request/provide constructive and meaningful feedback, including open, generous positive feedback and private, discreet negative feedback. Adopt a problem-solving approach to making the employee-employer relationship work, instead of only itemizing complaints and impediments.
7. Identify problems and resolve disputes as quickly and fairly as possible: Problems that are ignored have a way of ripening into disputes, and disputes left unresolved sometimes ripen into serious disruptions and costly litigation. Discuss and address disagreements as and when they happen.

6. Be consistent and objective in your treatment of employees: Avoid playing favorites. Evaluate and reward employees based on performance, not personality and politics.
5. Recognize that everyone makes mistakes: To err is human. Your performance or policies and practices may be imperfect. In any event, everyone, managers and supervisors included, can and will make mistakes. When mistakes happen, deal fairly with the past consequences, and try to fix the problem for the future.
4. Respect your employees' private lives: Recognize that employees have private lives that matter to them. Don't intrude more than is welcome. Accommodate their reasonable needs and interests, including their personal family obligations; be flexible to the extent possible, consistent with legitimate business considerations. Respect everyone's differences, such as race, ethnicity, background, and lifestyle.
3. Be fair and reasonable in all your dealings: Follow the Golden Rule: treat everyone the way you would want to be treated -- that is, fairly. Treat everyone so as to bring out the best that person has to offer.
2. Consider ADR techniques: When the foregoing approaches fail to avert or resolve a particular dispute, consider using such dispute resolution procedures as peer review, early neutral evaluation, mediation, and non-binding arbitration. (Use of ADR procedures should always be truly voluntary - not crammed down on employees as a condition of initial or continued employment.)
1. Be nice to plaintiffs' attorneys: When you get a telephone call or letter from a lawyer representing a current or former employee, consider it an opportunity to engage in mutual problem-solving. Consider meeting with the employee and his or her counsel to exchange views on what happened and how the situation might be remedied. Such discussions may circumvent litigation.

Appendix B

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