

Daily Journal

www.dailyjournal.com

FRIDAY, JULY 19, 2013

Fast and roughly right: a new strategy for decision-making

By Jan Frankel Schau

It is July, and your client has urged you to get through with the pending litigation as quickly and efficiently as possible. You call the court to schedule a hearing on a motion for summary judgment and the first available date is next May. You delicately broach the subject of ADR with your opposing counsel, select a busy mediator who can fit you in sometime in late August, and you and your client arrive for a full day's mediation hearing at 10:00 a.m. with great expectations. By 3:00 p.m., there have been no monetary offers or demands made and your client is getting frustrated with you, the process, the mediator and the entire judicial system.

There is great news coming out of business schools and corporate America about strategic negotiation. If the predictions made by Professor Rita Gunther McGrath of Columbia University's Business School are accurate, "fast and roughly right" decision making will soon replace deliberations that are "precise and slow." This new way of decision-making has extended beyond business to international banks, consultants and real estate professionals who all recognize that an ever-changing global economy demands new and innovative ways to stay ahead of the curve in order to maintain even a transient competitive advantage. In the time it takes to deliberate about a pending deal, all potential profit could be lost and the opportunity missed. Lawyers and mediators would be well served to adopt the same strategy as it applies to settling cases.

How does the "fast and roughly right" decision-making process work?

Nick Tasler, a human behaviorist and writer for the Harvard Business Review, suggests a simple, flexible, "Know-Think-Do" framework to enable business leaders to immediately start making these "fast and roughly right" decisions. He paraphrases Albert Einstein, saying "the framework should be as simple as possible, but not simpler."

The Know-Think-Do framework comes down to three distinct steps in every decision. First, the decision-maker must know the strategic objective. In terms of a lawsuit, that might translate as: "get out of the lawsuit before any further disruption to our business occurs at the least expensive amount by year end,"

or perhaps, "get the case settled at a level where I can pay my lawyers and cover my expenses for another year until I can find another job." In simplifying the strategic objectives, the decision-maker will have to eliminate some objectives in favor of the best or most salient one or two. This means the discussion should center upon which of the multiple objectives will have the biggest positive impact and will adversely affect the fewest possible stakeholders. Remember, there is no such thing as a perfect choice.

The next step is to think rationally about all of the possible options that may satisfy the primary strategic objective. This process is best done through what Tasler refers to as an "Anti-You." Let an objective third party (as in a neutral) shine a light on the potential options and help you and your client see which one aligns best with your identified strategic objective. By seeking out the opinion of a nonparty, those options that are weaker will be eliminated in favor of the stronger ones. The testing that goes on with the "Anti-You" is designed to highlight possible new insights as you talk through each option and to offer new perspective from the third party as to the feasibility and likely outcome of each of the "good options."

As in any decision, the last step is the most challenging. After identifying the strategic objective and laying out the good options that will align with that objective, the decision-maker has to do something: make the decision. This is hard because you are also deciding to go with that choice which you have declared to be "roughly right" under the prior analysis, even if it may not be "altogether" or "perfectly" right.

In my initial hypothetical of a client already having reserved a date for a motion for summary judgment, this may be the hardest step of all because it contemplates walking away from a judicial determination of who is actually "right" under the law in favor of the "roughly right" decision to settle without the satisfaction of knowing the results of all of your legal research, brilliant written briefs, and eloquent oral arguments. It is, in fact, the anti-you personified as you give up that slow, deliberative, counseling role in favor of a fast-paced, business-based decision.

Practical applications for decision-making in mediation

Like Tasler's 3-step framework of "Know-Think-Do," the first several hours of mediation are often spent probing towards the ultimate strategic goals of each party before any options or bargaining begins. When the mediator asks questions which appear to create rapport and trust, they are also mining to discover what is really driving the dispute. As these discussions go deeper, the decision-maker and his counsel can come to see and identify their own strategic objectives. For example, does the plaintiff have an alternative source of income so he or she can afford to maintain the lawsuit (for wrongful termination) for the next two years or does he need a cash infusion now? Is the corporate defendant under scrutiny by the labor commissioner for some wage and hour issues and wants to avoid a potential class action lawsuit or is it in talks to be acquired and wants to have all pending lawsuits off the books by year-end?

The next step, rational thinking and option generating, is a process with which neutrals are particularly adept. Instead of the "Anti-You," I prefer to call the neutral the "Alter Ego You" in this instance. The Alter Ego You will test out the best options by shining a light upon how these options will be presented to the other side. Sometimes, when you hear the options played back to you, they sound less rational or more appealing than they did when you first raised them. Next, the Alter Ego You will offer her own perspective on these various options — a rhetorical question, such as, "If your objective is to close this down by year end and you propose to demand a number that they have already told me is beyond what they can come up with in a lump sum settlement, how does that align with your strategic objective?" In discussing the various options with the Alter Ego You, the decision-maker may see a new or different perspective, leading them to narrow the field of possible good options to only one or two.

Finally, as Tasler suggests, after all of the hard work has been done to identify the strategic objectives and to think rationally about which options are best going to align with those goals, it's time to "call it quits on all of the planning, strategizing, number-crunching and critical thinking" and just select one option, even if it's not the perfect one.

Just as Einstein advocated, the process

should be as simple as possible, but no simpler. Once you have distilled the decision down to a written agreement, you and your clients can simply let go of all of the other "good" options. The signed agreement, as simple as it may be, will end the litigation and second-guessing. It will also achieve what your client came to you for: an end to the dispute, an end to the anxiety and expense of litigation and finality, sometimes even with a guarantee of compliance. It does not really get better than that.

Final thoughts

Ruth Gunther McGrath observed that the competitive advantage that many American businesses once enjoyed is no longer sustainable. Instead, we live and work in a new world of "transient advantage." Trial lawyers understand this concept too: you win some and you lose some. For that reason alone, business leaders are no longer sticking to the same old playbook and expecting the same results. Business students and young entrepreneurs who have been raised in the age of the Internet are well trained to think fast and accept "roughly right" decisions.

While a handful of trial lawyers take enormously large stake cases to trial each year, the vast majority of litigated cases get resolved without the theatre of a jury or the judicial determination of a jurist as to rights and remedies which may not be perfectly aligned with the strategic objectives of the disputants. Like business people, often the most successful lawyers and law firms are those that keep their clients out of court and find a way to meet their business or personal objectives reliably and consistently.

Business people are leading the way to radically re-thinking traditional decision-making models. Perhaps it is time for lawyers to also create a new playbook that includes the radical notion that the slow wheels of justice and deliberative decision-making that has characterized the judicial system should be brought

into the 21st century of "fast and roughly right" decision-making.



JAN FRANKEL SCHAU
ADR Services, Inc.

Jan Frankel Schau is a mediator with ADR Services, Inc. She can be reached at jfschau@adrservices.org.