Managing Disputes Across the Resolution Process Spectrum

THERE ARE MANY DIFFERENT PROCESSES that can be used to resolve a dispute. For example, the parties may sit across from each other negotiating by themselves. They may retain a mediator to help facilitate a resolution. Or they may litigate their dispute in a court. No matter the process chosen along that spectrum, each entails four principal transactional costs: money, time, emotions and control of the outcome.

Money. It costs money to resolve disputes. But it's important to remember that the true costs can be both direct and indirect. Direct costs could encompass e-discovery and document production costs, deposition expenses, expert witness fees, and, of course, legal fees. The more adversarial the dispute resolution process, the higher these costs tend to be. Indirect costs could include negative publicity, reputational harm, loss of employee productivity, and lost business opportunities because resources are being directed toward resolving the dispute. The longer it takes, the greater the likelihood that all of these costs will have an adverse impact on the company's future growth and profitability.

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Time. Relatedly, as Benjamin Franklin noted, "Time is money." On that topic, three-time Pulitzer Prize-winning American poet, writer, and editor Carl Sandburg once said that time, "is the coin of your life. It is the only coin you have, and only you can determine how it will be spent. Be careful lest you let others spend it for you." And Aristotle's successor, Theophrastus, said, "Time is the most valuable thing a man can spend." Yet, disputes unavoidably spend time on your behalf. Every metric of time diverted to handling a dispute is not being devoted to furthering a company's mission. Disputes also hold a company and the affected directors, officers, and employees hostage to a particular moment or moments in time. Most poignantly, the point in time when the dispute arose becomes a focus for the organization and remains so until the dispute is resolved.

Emotions. As David Packard, the late co-founder of Hewlett-Packard, said, "A group of people get together and exist as an institution we call a company so they are able to accomplish something collectively that they could not accomplish separately—they make a contribution to society, a phrase which sounds trite but is fundamental." A company is nothing but the passion, dedication, and commitment of its people, and, as Jack Welch, former CEO of GE, said, "It goes without saying that no company, small or large, can win over the long run without energized employees who believe in the mission and understand how to achieve it." Employees who can direct their emotional capital toward what they enjoy doing are the ones who contribute the most to the company's objectives and, consequently, to its overall success. At the same time, individuals who are compelled to invest emotionally in issues having little or nothing to do with the company's mission–such as an unresolved dispute–are likely to find their ability to participate meaningfully in the company impeded and, thus, feel disheartened, discouraged, and demoralized. Devoting energies toward resolving disputes requires an expenditure of emotional capital that will almost always take a negative toll.

Control of the Outcome. Influential management consultant Peter Drucker once said, "Management is doing things right; leadership is doing the right things." Steering a company in line with its mission, growing profitability, respecting and responding to its customers, and safeguarding its

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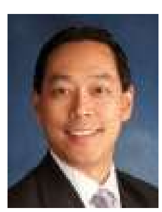
More Collaborative ←				→ More Adversarial
Pure Negotiation	Mediation	Evaluative Techniques	Arbitration	Court Litigation
	Facilitative	Fact-Finding	Arb-Med	
	Evaluative	Peer Review	Hi-Lo	
	Transformative	Early Neutral Evaluation	Pre/Post-Dispute	
	Med-Arb	Mini-Trial	Arbitral Appeal	
More Time, More Money, More Emotions, and Less Control Over the Outcome →				

reputation are all responsibilities over which management must exercise proper control. Disputes, however, hold the potential to diminish management's ability to control one or more of these areas. Sometimes, depending on the process used to resolve the dispute, decision-makers may have little to no control over the outcome, creating the potential for results that could adversely impact the company.

Considered together, these four transactional costs point to one inescapable conclusion: moving from a pure negotiation process for dispute resolution toward court litigation results in companies spending more money, more time, and more emotional capital to achieve an outcome over which they have increasingly less and less control (see table above).

It behooves all of us who are charged with managing the resolution of disputes to consider carefully how these transactional costs manifest themselves in and within the various forms of resolution processes along this spectrum. No single process is appropriate for every dispute, and many disputes could likely benefit from a combination of processes. Future columns of The ADR Mosaic will explore in more detail many of the key attributes of these various processes. ■



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