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The Immovable Elephant: Motivating Lawyers Toward Early ADR Efforts

Jeff Trueman (Jeff Trueman Mediator) · Wednesday, February 14th, 2018

As Chip and Dan Heath describe in their book *Switch: How to Change Things When Change is Hard*, we are rational beings with a “Rider” that logically analyzes our surroundings. Our Rider tries to direct our emotional side, “the Elephant.” Although we like to think our Rider is in control at all times, in truth, the Elephant is in charge much of the time. Data concerning the benefits of early case assessment and planned early dispute resolution may be appealing to the Rider, but if the Elephant is afraid of an unfamiliar process that might lead to bad outcomes, it will not move.

Perhaps the typical litigation mindset, beset by righteousness, indignation, and hot blood blind the Elephant because litigation itself – lawyers, subject matter experts, discovery, court orders, trials, appeals – is so familiar. For many people, litigation feels good, like a hammer of vindication that will force the other side to do what is “right.”

Oddly enough, however, the Elephant should fear litigation as the preferred method to resolve high-stakes disputes. Although clients may have a strong desire to know what will happen in complex cases, counsel can only offer educated guesses. Few people fully appreciate how many jurors do not want to serve on a panel. Some jurors may have limited attention spans or an inability or unwillingness to understand and apply the nuances of the law. Some may not want to compromise with others. None of the jurors lived through the history of the dispute and none will live with the fallout.

Subject matter specialists who charge unbelievable fees have no greater insight into how judges will decide key issues along the way or how jurors will interact with each other. When companies choose to manage conflict with traditional litigation, they invest in speculation and forecasts – a strategy usually not considered sound or advisable when stakes are high or resources limited.

The Driver may be aware of these risks, but how much appreciation does the Elephant have for them? Instead of managing litigation risks, the Elephant may be distracted by the fear of exposing its vulnerabilities underneath its legal positions (i.e., what it really cares about; what is getting in the way; how it can move beyond those barriers, etc.). The Elephant is also distracted by a fear of failure. A growth mindset – where learning and failure is seen as a necessary part of growth – is often not allowed in our professional worlds. Perceived failure, how one appears to others, is one of the supporting blocks under what University of Missouri School of Law Professor John Lande calls “the prison of fear.”

As Chip and Dan Heath explain in *Switch*, sometimes change is inhibited not by the Rider's directions, or by the Elephant's lack of motivation, but by situations that require a clear path to move forward. In the early stages of litigation, parties lack information about the allegations and whether or not settlement is advisable. The Rider and Elephant may see a clear path toward early resolution after factual discrepancies have been assessed against the relevant law, when the right amount of time has passed after notice of a dispute.

Early management of conflict may threaten the culture of traditional litigation but nothing threatens the self-determination of parties, or requires them to bargain in a certain way, or to compromise their interests more than they want to. The only agenda of early ADR proponents is to implement and employ tools that are more effective and efficient than "the prison of fear," the golden handcuffs that come in the form of billable hours, and crystal balls that forecast the future.

The real potential for early resolution starts with a determination from lawyers to do business differently; to think about how cases tend to flow; to engage in meaningful settlement talks before the eve of trial; to interpret an invitation to negotiate as an opportunity that can produce a good result for the client rather than as a sign of weakness; and to fully appreciate the unpredictable nature of law suits regardless of how much subject matter and technical expertise is purchased by one side or another. As some lawyers have learned, they can gain from promoting innovation and cost-savings as value-added benefits to clients. In turn, clients may become Riders atop of Elephants who are motivated to move toward better litigated outcomes that can be obtained in less time and with less expense.

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