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The Successful Litigator's Settlement Playbook

By **Dan Packel**

Law360, New York (September 18, 2014, 5:57 PM ET) -- While conventional wisdom says that no one walks away from a successful settlement completely pleased, litigators and clients have much to gain from putting a case to bed before it gets to the courtroom: namely, the ability to save substantial time and avoid the inherent uncertainty of a jury trial.

Still, attorneys must recognize that the decision to settle ultimately rests with the client.

“You have to have a client who has a buy-in on the notion of the intent to solve the case, but in no way is that an abrogation of the right to try the case,” said Joel Rosen, a Montgomery McCracken Walker & Rhoads LLP partner who focuses on alternative dispute resolution.

With that caveat in place, here are some keys from seasoned litigators to landing settlements that will keep clients as happy as possible:

Know Your Case ... and Your Adversary

Experts pushed the importance of not rushing into negotiations but instead getting a full handle on the case and all its complexities. This involves one’s own legal position, as well as the demands and realities of the opposing side.

“It’s always important at an early stage to get an assessment of your opponent: both the counsel that are handling the case and the parties that are involved,” said Wayne Mack, a partner at Duane Morris LLP. “Get an understanding of what their history is in litigation and their history of settling. Get a sense of their objective in the case and of their appetite for litigating it.”

It’s also critical to get a full reading on the numbers involved. Mack pointed to his firm’s proprietary tool, Dispute Navigation Analytics, that looks to players’ past histories to estimate the costs of litigation.

Plaintiffs and defendants will invariably have different strategies for gathering the details of the case in question. Defendants need to have a firm reading of the details of the damages plaintiffs have suffered.

David Kistenbroker, a partner at Dechert LLP, emphasized that in his field, securities litigation, damages claims are often highly inflated.

“Looking at alleged damages in a scientifically orthodox way allows us to trim a damages claim

significantly," he said. "I like to be able to explain to a mediator, on well-grounded economic theories, why a claim is off."

Plaintiffs have a different set of tools at their disposal. For business litigation, John Stoviak, a partner at Saul Ewing LLP, recommends listening to a company's investor financial calls, which are publicly available.

"There, you get can sense of what the CEO and CFO are thinking about the company and saying to analysts," he said. "You can hear their ethos and style and what they're thinking about and determine what would lead them to give you a settlement that's in your best interest."

Pay Attention to Timing

Although there are certainly exceptions, attorneys advised against entering settlement negotiations too early. Again, getting proper information is crucial.

"One key is having efficient data and discovery so that you have a sense of the facts of your case, so you're not going in too early," said Rosen, a former U.S. magistrate judge.

That's not to say that there's nothing attorneys can do to push the scales in their direction in the early stages of a case, especially if they remember the maxim to negotiate from a place of strength.

"Early on, when the other side is asking for an outrageous sum, ask them to substantiate it," recommended Gretchen Jankowski, a shareholder at Buchanan Ingersoll & Rooney PC. "That will get them off that outrageous demand."

Later in the game, an opening might emerge after depositions have been taken, and it did not proceed in the way the adversary would have preferred.

"When an opponent has a very unrealistic view of what their case is worth, it is probably going to be very difficult to resolve it at an early point in time," Mack said. "You have to go through a process of educating them through discovery and motion practice that their case has significant flaws."

On the other hand, there can sometimes be value in attempting a prompt resolution, especially if the parties intend to keep doing business together.

But the success of a prelitigation conference or mediation depends on the parties' willingness to exchange information, Rosen emphasized.

Keep Clients in the Loop

Without a client who is clued in to the process of negotiations and the strengths and weaknesses of the case, the settlement process is likely doomed.

Since more and more cases wind up in mediation or settlement talks after the completion of discovery, it's essential that clients know how their case is progressing.

"You've got to keep the client informed as you go along that 'these witnesses are not helping us.' You can't spring that on them at the end of discovery," said Bill McDaniel, a partner at Ballard Spahr LLP.

“Otherwise, you’re going to have a train wreck at settlement because you don’t have the client on board with expectations.”

A candid approach will also help flush out misinformation that’s come to the client through other channels.

“A lot of times, people have friends, neighbors or colleagues that will try to tell them what the case is worth. ‘This happened to my cousin. I read about this there,’” Rosen said by way of example. “What I say is that every case is different. If the person who is giving you advice is wrong, who loses?”

Rosen also stressed the importance of bringing clients along to key settlement talks or mediation events.

“If the actual clients are there, they should be participants,” he said. “Whoever is conducting the process can meet with them, explain the process and — should it settle — point out the various strengths and weaknesses.”

Don’t Neglect the Details

Since so much gets done in mediation and other formal settlement procedures, it’s crucial to pay attention to who is conducting the process.

For private mediators, this involves developing an understanding of their background and whether they have conducted settlements or mediations in a particular area. Attorneys can also take it upon themselves to inform the mediator or the judge of the details in the case.

“When I was on the bench, I wanted to be prepared,” Rosen said. “Rather than just walking into the room and saying, 'What is this all about,' you want to know.”

When it comes to sitting down and grinding out an agreement, Jankowski also recommended coming into the room with an actual term sheet — one that resolves questions like confidentiality and whether a settlement payment will come in one installation or multiple rounds.

“I’ve seen settlements get derailed because there are material terms that were not discussed,” she said.

Jankowski added that she has seen some of the more skilled mediators do this on their own, obligating participants to sign a sheet ahead of time.

Even if that's not done, it's crucial to get the terms down at the end. Some mediators will use their laptop to secure the details while others might even pass a recorder around the room in order to capture the parties' commitments, according to Rosen.

Build Relationships

Since trust is another essential factor in securing settlements, a mutually satisfactory deal can lay the groundwork for future agreeable resolutions.

“If your opponent in the plaintiffs bar knows that if they talk to you, that they will get honest straight-shooting in the case, that helps you. It cuts through the garbage,” Kistenbroker said, discussing securities litigation.

Jankowski also pushed the benefits of familiarity with an adversary.

“Knowing your opponent is key,” she said. “If you don’t know them and give a final offer, but their expectation is that they will still go back and forth with you in negotiations, that doesn’t help.”

Conversely, certain tactics will backfire both in the immediate case and tarnish future efforts.

“I don’t find that bullying tactics work,” Mack said. “I don’t find that attorneys that are dishonest or make ridiculous, unsupported statements [have their efforts] work.”

--Editing by Jeremy Barker and Christine Chun.
