Timing is everything

Identifying key opportunities to attempt settlement negotiations

Interviewed by Sue Ostrowski

If your company has been hit with a lawsuit, you may want your attorney to tell you up front if he or she is going to settle the case or fight to the death through a trial.

But that's not always something that can be determined in advance, says Alex Craigie, a trial lawyer with Dykema Gossett, PLLC. Instead, there are several key points during the process at which the attorney and the client should assess the value of going forward with the case versus settling.

"Settling is not always the best option," says Craigie. "But if it is a case in which the defendant wants or needs to settle, there are certain key times during a case that it can leverage that option."

Smart Business spoke with Craigie about critical times during a lawsuit to evaluate whether settling, or moving forward with the case, is the best option.

Alex Craigie
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What is the first key point at which to consider settlement options?

The parties can discuss settlement at any time, but I've found there are a few pressure points during the life of a case where it can be strategically intelligent to consider engaging in settlement negotiations.

The first is at the very onset, before the company has been served with the suit or filed its response. At this point, the parties' costs are still at a minimum, and this fact alone sometimes creates an incentive for a reasonable settlement.

But not always. At this point, the attorneys have only heard one side of the story— their client's version. The plaintiff's lawyers may be overly optimistic about the quality or value of the case. A company defendant and its lawyers might be too bullish or unrealistically undervalue the case. Either of these circumstances can complicate negotiations. While the concept of an early settlement sounds appealing, finding a common ground this early in the litigation can be challenging.

When is the next juncture that provides a settlement opportunity?

I find a second key time to negotiate may be as soon as the deposition of the plaintiff or the plaintiff's key witness has been completed. Sometimes the sheer intrusiveness of the deposition makes the plaintiff uncomfortable enough that they no longer want to pursue the case the way they did at the outset. I find this particularly true in sexual harassment, discrimination and certain personal injury cases.

The deposition might also have revealed facts that weaken the case for one party. If the plaintiff's case was weakened by the testimony, they may begin to value the case more realistically, closer to the defendant's estimate.

By the same token, a company defendant's desire to resolve a case might increase if harmful information was learned for the first time during the deposition.

How can filing a motion to dismiss lead to settlement?

A dispositive motion, whether for summary judgment or dismissal, should always lead an opponent's lawyer to re-think their settlement stance. Regardless whether it is a 'slam dunk' winner, a dispositive motion creates a risk that the plaintiff will walk away with nothing. This is a key pressure point and an opportunity to discuss settlement.

I can't blame a company defendant, who has filed a strong motion, from becoming further entrenched in its bullish position. After all, it could be just a hearing away from complete victory. On the other hand, this is perhaps the best opportunity to find out if settlement is possible. The risk created by the motion can reduce a plaintiff's expectations to the point where 'peace' can be purchased relatively cheaply. This is all the more true if, by settling, the company avoids the extraordinary defense costs and risks associated with a full-blown trial.

Is there still room to settle before a trial begins?

Absolutely. Trial is war. Preparing for any trial is a risky and expensive endeavor. It is also disruptive to the company, especially if it is a smaller company. It can take every hour of every day for several key employees to prepare. The company must devote an enormous amount of resources, both money and time, to preparing. If the case is going to be settled and should be settled — and let me emphasize that not every case should settle — an optimal time to do it is before you get to the final trial preparation phase.

In the final four to six months before the trial, the parties and their lawyers should be asking, 'When are we going to start incurring trial preparation costs? When are we going to start pulling people away from their normal jobs to prepare for trial testimony? When are we going to start hiring experts, which becomes very expensive? When are we going to start filing pretrial motions and jury instructions?'

So, for example, if the trial is set for October, your attorney should be able to tell you that you'll need to kick it up starting in late June. If you want to attempt to settle before trial preparation costs really start to mount, you need to be thinking June or earlier.

Do you suggest the parties use a mediator to help them negotiate?

Yes. But I don't advocate working with a neutral prematurely. I've found that, in most cases, a neutral does not bring a lot of value to the parties' settlement discussions until there has been at least some basic fact discovery completed. Otherwise, the neutral just regurgitates both parties' unsubstantiated claims. In my view, the parties should complete one or more key witness depositions and exchange documents before engaging in a mediation. At that point, the neutral has something to work with. <<

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