IT'S SETTLED - EFFECTIVE STRATEGIES FOR SUCCESSFULLY RESOLVING DISPUTES

Steele Clayton
Bass Berry & Sims (Nashville, TN)
615.742.6205 | sclayton@bassberry.com

It's Settled – Five Strategies that You Need to Successfully Settle a Dispute
Steele Clayton

There are many reasons a company facing litigation may desire a resolution outside of a courtroom. Litigation is a time intensive, expensive, risky business for many companies. Media coverage of a trial can force a company into an unflattering lime light for several weeks, if not months. As a result, more and more companies are seeking out ways to settle cases rather than proceeding to trial.

Today's lawyers, whether they are trial lawyers or in-house counsel, must develop a skill set aimed at obtaining the best settlement for their client. This article shares five settlement strategies for counsel to keep in mind as they engage in settlement negotiations.

Timing is Everything

Generally, it is better to settle as early as possible to minimize the costs of litigating the case and avoid unnecessary exposure. It is, however, next to impossible to resolve a dispute without first engaging in some form of discovery, although the parties may feel that "fees spent on discovery and attorney's fees [are] better spent in settlement negotiations." Parrado v. Perfectemp Inc., No. 13-81100-CIV, 2013 WL 12152425, at *1 (S.D. Fla. Dec. 23, 2013). Engaging in some form of discovery prior to entering negotiations, while expensive, may actually facilitate settlement negotiations by clarifying and narrowing the factual issues before the court. See id. Discovery provides the parties with an opportunity to learn more about the relative strengths and weaknesses of each party's case. Counsel may choose to disclose certain materials prior to approaching the other side with an offer in an attempt to telegraph the strength of their case. On the other hand, counsel may not want to enter into settlement negotiations right away if they believe that they need to obtain documents to further support their claims or defenses. The key to successfully timing the negotiations around discovery is to balance the expense of discovery against the need for sufficient information.

Understanding the nature of your client's business, and how drawn out litigation could affect it, is another crucial aspect of determining the ideal time for settlement. If your client's company is, for example, a manufacturer, and they rely exclusively on the opposing party to provide a component part, prolonging the litigation will almost certainly result in lost revenue. In such instances, the company is likely willing to settle for a less appealing resolution to the case in exchange for a speedy return to the former status quo. If, however, your client is a large corporation, and the opposing party is not, it may be worth waiting to settle the case due to the difference in resources available to the parties.

The timing of settlement negotiations may not always be a choice for the parties. Courts, often facing overloaded dockets, have increasingly turned to alternative dispute resolution ("ADR") programs to alleviate their caseloads. Courts may encourage parties to engage in settlement negotiations, or they may affirmatively order them to do so. See, e.g. Mich. Ct. R. 2.41 ("At any time, after consultation with the parties, the court may order that a case be submitted to an appropriate ADR process."). To the extent parties can control the timing, however, they should aspire to ensure that they enter settlement

negotiations at an opportune time for their client.

Be Prepared

Before either side can engage in effective negotiations, both need to be aware of: (1) the issues that need to be resolved, and (2) the relative strengths and weaknesses of each side's case. It is not enough to enter into negotiations with a list of general demands and a rough understanding of the legal issues. Prior to entering into negotiations, counsel should be well versed in the best, worst, and most likely scenarios if the case does not settle. The client should also be aware of the risks inherent in failing to resolve the case prior to trial, and should be aware of how counsel anticipates the negotiations unfolding.

Preparation requires some amount of creativity. Every case's settlement negotiation process is unique. In preparing for a settlement negotiation, counsel should consider how the distinctive facts and personalities present in the litigation will impact how the negotiations proceed. It can be helpful to consider "what if" scenarios by anticipating the opposing side's likely reaction to certain moves. For example, if your client enters negotiations with a remarkably low offer, is that approach likely to intimidate or irritate the opposing party? On the other hand, if you make a generous offer on one issue, how is that likely to impact other issues? Will the opposing party perceive such an offer to be a sign of weakness, or will it make him or her more likely to offer a reasonable accommodation on the other issues? No settlement negotiation is going to proceed exactly according to plan, but counsel should still consider likely scenarios to ensure that he or she is capable of making strategic decisions in response to developing negotiations rather than simply reacting.

Counsel may also consider preparing for official negotiations by conferring with the other side. One common approach is to set a settlement range prior to beginning to negotiate in earnest for an exact value to resolve the dispute. This may save time during the negotiation process by avoiding needless posturing from either party. Another approach is to meet with opposing counsel and formulate an agenda for the negotiations to ensure that both parties agree on the exact issues that need to be addressed before the case can be resolved.

Choose the Correct Forum

Settlement negotiations can take many different forms. While using a third party to mediate the dispute is becoming more common, it is not the only option. In fact, some clients may prefer to have the attorneys engage in informal settlement negotiations, either over the phone or via written correspondence, to see if the case can be resolved without being forced to pay a third party to mediate the dispute.

A number of factors can determine which forum is best suited for settling a dispute. First, counsel should consider the nature of the dispute at issue. If the case at issue is an employment matter, and the plaintiff is an individual, bringing in a third-party mediator may provide the plaintiff with an opportunity to feel "heard," and may facilitate resolution more readily than a candid phone call with opposing counsel. On the other hand, if the parties are business entities, it may be possible, as well as less expensive and time consuming, to exchange written settlement proposals.

Counsel can also customize the format of the offer process. In traditional negotiations, one side offers an amount to settle the dispute to the opposing party, who will then counter with their own amount. This process can be tedious and time consuming. One alternative to this approach is to offer a range of numbers that would settle the case rather than a single value. This process is known as "bracketing." For example, one party may propose a range of $500,000 to $1,000,000. The opposing party may then counter that range by proposing a range of $100,000 to $300,000. The parties will then continue to go back and forth until they agree to an acceptable bracket of values. Once the parties agree on a bracket, they can then return to traditional negotiations to identify a single value within the bracket. Bracketing can have a number of advantages, including providing a way for the parties to signal how far they are willing to move to settle the case without making an explicit offer.

Counsel's relationship with each other can also play a role in determining the proper forum for a settlement negotiation. If counsel have a strong working relationship, and know they can engage cooperatively to resolve the dispute, there may not be a need to pay a third party to mediate the case. On the other hand, if counsels' past attempts at written or telephonic negotiations have ended in impasses, it is likely best to begin exploring alternative options. It may, for example, be worth considering an in-person meeting. While the idea can seem quaint in today's digital world, it is often easier to take a more aggressive stance in an email than it is when opposing counsel is sitting in front of you. Regardless of the approach taken, it is important that, at a minimum, counsel can engage candidly and acknowledge when one process is not working to ensure that their clients' resources are utilized in an efficient manner.

Set Reasonable Expectations

No settlement ends in both sides walking away with the "perfect" result. Counsel should aspire to obtain the best result possible for their client, but he or she should also ensure that the client is prepared to accept such a settlement if and when it is offered. As one court remarked, "[e]ven if an attorney obtains a favorable deal for a client, if he cannot convince the client to take it, then he has failed in one of his key tasks." City of Alexandria v. Cleco Corp., No. 1:05-CV-1121, 2011 WL 13128268, at *2 (W.D. La. June 27, 2011).

Client communication is key. At every stage of the settlement process, counsel should ensure that the client understands the relative strength of their case, and what they can expect to find in a realistic settlement offer. This is not to say that clients should sacrifice all of their demands to ensure that a case settles. Rather, counsel should encourage clients to prioritize their demands. What must the client receive to make a settlement worth it? What is the client willing to give up to obtain that result? These discussions may also provide an opportunity for counsel and the client to work together to formulate a creative settlement offer. For example, a manufacturing company may be willing to forego a large monetary settlement if it can obtain specific performance from a supplier.

Part of counsel's obligations in setting reasonable expectations is to ensure that their respective clients enter negotiations prepared to make a good faith attempt to settle the case. It is not uncommon for parties to seek to make an initial offer that either far over or under values the dispute at issue. This tactic is rarely effective, and may antagonize opposing counsel. To the extent that counsel can, he or she should try to encourage clients to only make offers that are likely to move the negotiations forward, and avoid making unreasonable demands.

Don't Litigate the Settlement

Counsel should not approach settlement negotiations, although technically adversarial proceedings, the same mindset as a brief or an oral argument. The goal of settlement negotiations is to ensure that you obtain the best possible result for your client. The relative strength of the client's legal case is important to these negotiations, and thus some amount of substantive discourse on the relative strengths and weaknesses of each side's case is inevitable, but it should not be the focus of the settlement discussions. Substantive debate over the merits may distract from discussing each party's demands, wasting valuable time for both parties, and it may also run the risk of irritating the other side. Counsel should be discouraged or limited from arguing the merits of the case during settlement negotiations.

One approach to ensure that the parties focus on the settlement rather than substantive arguments is to center the discourse on the interests of the parties rather than on their positions. For example, rather than discussing whether the opposing party breached a duty of care, discuss what your client needs to obtain from the opposing party to agree to a settlement. This could be a monetary amount, or it could be some form of equitable relief, whether in the form of partial performance or recession of a contract. In any event, discussing the interests of the parties avoids engaging in a counterproductive debate about their legal arguments, and has a stronger likelihood of leading to a settlement.

Conclusion

The traditional civil jury trial is becoming increasingly rare as costs of engaging in litigation continue to increase. Settlement negotiations are rapidly becoming a key aspect of civil litigation, and counsel should focus on developing a sophisticated skill set to ensure that they are able to capably represent their clients in settlement negotiations. The five settlement strategies outlined above provide a comprehensive overview of the key considerations counsel should focus on as they engage in settlement negotiations.

E. STEELE CLAYTON, IV

Member

BASS BERRY & SIMS (Nashville, TN)

615.742.6205 | sclayton@bassberry.com

Steele Clayton helps his clients resolve their business and commercial disputes. Whether negotiating or litigating a resolution, Steele believes that economic sensibility and the long term best interest of the client's business should always be in the forefront. Over the last 20 years, Steele has helped clients resolve a wide variety of business and commercial disputes in state and federal courts throughout the United States as well as in private arbitrations and mediations. Steele also serves as the vice chair of the firm's Antitrust and Trade Practices Group where he provides training and counseling to his clients as well as representing clients in private and government litigation matters.

Steele's practice involves Antitrust & Trade Practices – Advising clients with respect to the Sherman Act, the Clayton Act, the Robinson-Patman Act and state antitrust laws across a variety of industry sectors in private lawsuits and actions brought by federal and state enforcement agencies; designing, implementing and training on antitrust compliance programs; defending clients with respect to consumer class actions and other trade-specific claims; Business Disputes – Representing companies in various commercial disputes including contract disputes, fraud, misrepresentations, interference with business relations, breach of fiduciary duty, consumer protection acts, the Uniform Commercial Code, securities violations, post-merger and asset purchase disputes between buyers and sellers, trade secrets and non-compete and non-solicitation matters; counseling clients with respect to their contracts and other business documents with an eye toward litigation issues; and Internal Investigations – Conducting internal investigations for both public and private companies relating to antitrust, financial reporting, internal controls, company policies and procedures and officer and director malfeasance.

While his antitrust practice covers a wide range of industries, a significant portion of his practice is in the healthcare industry. His experience as a CPA gives him an in-depth understanding of business generally and the financial issues that are relevant in business litigation or an investigation.

Related Services

- Business Disputes
- Antitrust & Trade Practices
- Litigation & Dispute Resolution
- Compliance & Government Investigations
- Healthcare Disputes
- Healthcare Law
- Utilities – Telecom, Energy & Water

Accolades

- Best Lawyers in America® — Nashville Litigation: Antitrust "Lawyer of the Year" (2019, 2017, 2015)
- Best Lawyers in America® — Commercial Litigation; Litigation: Antitrust (2011-2019)
- Nashville Bar Foundation — Fellow
- Certified Public Accountant (1990-1995)

Education

- University of Tennessee College of Law - J.D., 1994
- University of Tennessee - M.Acc., 1989
- University of Tennessee - B.S., 1988