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Take a **Realistic Approach** To Settlement Strategy And Mediation

Maximize your chances for an acceptable agreement.

BIGSTOCK

BY MARK E. SEGALL

As is well-known, almost all civil litigation is resolved by settlement rather than by trial. Nonetheless, far too many clients and law firms litigate cases in a manner that makes settlement far more difficult and expensive than it should be. This article will explore how parties should evaluate litigation opportunity and risk, and how mediation should be conducted to maximize the chances that an acceptable settlement will be achieved. Finally, the article will address the utility of a mediator's proposal in helping the parties conclude an agreement.

MARK E. SEGALL, *former head of litigation for JPMorgan Chase & Co., is a mediator and arbitrator with JAMS.*

The Evaluation of Risk

The most fundamental thing that lawyers must do from the moment litigation becomes a possibility is to assume ownership of the litigation opportunity or risk.

Lawyers have an obligation to evaluate constantly the risk or reward (depending on whether the client is the plaintiff or the defendant) and figure out the settlement and litigation strategy. In virtually every case, an early case assessment is in order. It is remarkable, but not surprising, that in a very high percentage of cases the result of an objective assessment really does not necessarily change more than at the margin as the case proceeds. That explains why so many companies have adopted formal early case assessment programs as part of their standard operating procedure. But, even assuming an early case assessment is made, this same analysis must be done again and again at periodic intervals throughout the life of a dispute. If discovery has produced some bad results or the judge has issued a ruling that probably will affect the ruling adversely, that needs to be factored into a new analysis.

In making this assessment, it is crucial to focus on what reasonable best- or worst-case damages are. If there are a range of possible damages, then those should be assessed as well.

Then the next question is what the odds are that a judge or jury will find liability. Lawyers are fortunate in this day and age that they need not rely just on their intuition in addressing questions like this. One of the best tools available is jury focus group work. By testing a case with a pool of people that mirrors the actual jury pool, one can evaluate how certain business practices will be viewed by the judge or jury. It may well prove to be the case that certain practices that have been regarded as standard in the industry and acceptable may not be viewed the same way by those who are not steeped in the affairs of the business. If a case is large enough, it may well be that individual witnesses' testimony can be evaluated by the jury focus group or even that a full mock trial or mock arbitration can and should be held.

The result of these exercises is to produce a number, albeit one that necessarily is imprecise. In considering what that number means for the purpose of negotiating a settlement, the focus should not be on what a great or good settlement would be. After all, great or even good settlements rarely take place. Rather, at the end of the day, the focus has to be on what is the lowest figure one would accept as the plaintiff or the highest amount one would pay as the defendant. Clients should ask their lawyers what number they would recommend to accept as "barely tolerable" rather than going to litigation with all the attendant risk and expense. The concept of "barely tolerable" is important because at the end of the day, particularly if there are skilled negotiators on either side, sometimes that is all that can be achieved in a settlement. Putting the question in just that way makes people face and make tough choices. The participants in mediation often need to be told explicitly to abandon their initial goal of achieving a settlement that is a home run because those are rarely achievable

Lawyers have the obligation to raise the topic of settlement. They need to take the risk that the clients will regard them as "weak" if they raise the subject. Furthermore, the decision-making process on settlement has to be moved from those whose conduct is at issue to those who bear the economic consequences of a win or loss. Frequently, the people who are involved cannot step back and work through the problem objectively. This is totally understandable, but can be a real obstacle to settlement. When the plaintiff is an individual, this issue rears its head throughout the life of a case. Sometimes, the spouse or significant other of an individual plaintiff can be a useful sounding board if the plaintiff allows them to be part of the process.

If the client is a business with a full litigation portfolio, this process needs to be undertaken with respect to every case of significance. Otherwise, one can have no confidence in the level of litigation reserves that have been established for the portfolio as a whole. Similarly, this form of rigorous case-by-case analysis is what enables heads of litigation at major companies to be comfortable with the representations they are making internally, to their outside auditors, and ultimately to the investing public.

By doing work along the lines outlined above, lawyers and clients put themselves in a position where they are prepared properly for mediation. It is to that subject that we now turn.

Too many lawyers overemphasize the importance of learning about the other side's position through **document production and depositions** before they say they can have an informed view. As noted above, **proper early case assessment** can predict almost all the relevant factors affecting settlement at the outset.

The Mediation Itself

Mediation works because, among other things, both sides have an opportunity to present their case before a neutral and have an opportunity to be heard. The salutary effect of such a process cannot be underestimated. This is true even in cases where the parties have been litigating for years or there is significant animosity either between counsel or the clients themselves. Even though the prospects for settlement appear dim, the dynamic of mediation usually produces an atmosphere conducive to settlement.

There are many benefits to mediating sooner rather than later. Too many lawyers overemphasize the importance of learning about the other side's position through document production and depositions before they say they can have an informed view. As noted above, proper early case assessment can predict almost all the relevant factors affecting settlement at the outset. Of course, the enormous cost of discovery, particularly in this era of electronic evidence, cannot be underestimated. Once the electronic discovery spigot is turned on, the costs are

overwhelming. Both sides quickly spend so much money that settlement becomes impossible. In almost every case, however, the essential documents, almost all of which are known early on in the case, can fit in a small, one-to-two inch binder.

Lawyers should never assume that their clients would oppose early mediation. They need to ask, and, if they do so, they may be surprised how often the answer is that such early mediation is acceptable. Similarly, judges that inquire about the interest in settlement negotiations at status conferences should insist that the lawyers consult with their clients before delivering a response.

An argument that one hears frequently in opposition to early mediation is that it will lead the other side to understand all the "secret" strategies and tactics. There is little truth to that. Able counsel can figure out those arguments on their own.

Conducting an effective mediation requires proper planning. The importance of a pre-mediation conference call with the mediator cannot be understated. At such a call, it is important to determine starting and stopping times (and learn in particular whether both sides have the ability and willingness to negotiate into the evening if necessary), who will attend the mediation, the nature of pre-mediation submissions, and how the mediation will begin. It is particularly important to ascertain that both sides will have representatives with the authority to resolve the matter. While this is not possible if either the plaintiff or the defendant is an individual, it is better if the business representative at the mediation is not someone whose conduct is at issue but rather is responsible for the economic profit or loss to the corporate income statement. Such a representative is much more able to look at the position of his or her side objectively.

Planning proper mediation submissions is also important. Frequently, it works well when submissions are exchanged with the option for an additional ex parte submission to the mediator. The benefit of an exchange of statements is that it affords an opportunity for each side to hear directly the arguments of the other side.

That is also one of the main benefits of a joint session at the start of the mediation. While in certain cases, the joint session can be counterproductive due to the level of animosity on both sides, in many cases it can advance the path towards resolution. Parties can see the strengths of their case, along with their weaknesses and the opportunity to be heard. In order to mitigate the risk of tempers flaring at the joint session, it is wise for the mediator to require that the presentations be low-key and matter-of-fact with an absence of gratuitous adjectives and adverbs. Telling the parties at the mediation not to be disappointed in their lawyer's lack of passion at the joint session when they are just following the instructions of the mediator to avoid jury speeches or other histrionics is also wise.

The mediator should ask questions of the parties in both joint and individual meetings designed to point out weaknesses. There is also real value in asking each side to identify the other's strongest points and how they would address them. Where there are technical defenses or arguments that might be analytically correct but might not play well with a jury, it makes sense to point those out as well. If certain of the participants in the mediation are more constructive than others, it may be productive for the mediator to convene separate sessions just with those people.

If the initial mediation does not result in resolution, the mediator must be persistent and willing to engage in appropriate follow-up. It is frequently the case that the parties either need to exchange additional information on damages or other aspects of the proof or simply reflect on what has transpired during the mediation session. With the parties' permission, the mediator should not let the settlement efforts die until and unless every reasonable path towards compromise has been pursued.

Reaching an Agreement

The goal of any settlement negotiation is to reach agreement. Sometimes parties can settle without mediation either through the exchange of bids or with careful analysis of their case. However, in many cases, the negotiations can stall, and the mediator must come up with a solution.

That solution often takes the form of a mediator's proposal, which represents an effort to bridge the gap. The mediator comes up with a number and works with both sides to figure out what would be a reasonable timeframe for both sides to respond, which can range from a few minutes to a week. At the end of that time, both sides then inform the mediator ex parte whether they accept or not. If both sides say yes, there is a deal. If either side says no, there is no deal and neither side learns whether the other side says yes.

Mediator's proposals need to be formulated with great care and will rarely succeed without an advocate on each side to advance acceptance by the party. The mediator must be patient and not make a proposal until it is clear to all involved that there is little or no chance of reaching a resolution in any other way.

Mediator's proposals work extraordinarily well. In large part, this is reflective of much of the dynamic that precedes the mediation itself. Prior to the mediation, the most senior people within a company may not grant the authority necessary to resolve a case because either they believe that everyone always spends the authority they are granted or they have some hope of achieving what really would be an excellent settlement for them. Once that effort fails, the parties can report back to their most senior decision-makers that acceptance of the mediator's proposal is necessary to resolve the matter. At that point, they have no choice but to accept the settlement as barely tolerable and thereby resolve the case.

Parties and their counsel should be thinking of the impact their decisions will have on mediation at every step in the litigation process. From the initial risk assessment to settlement, choices must be made with an eye to mediation. With most cases settling, it is only common sense to include the possibility of mediation within the litigation strategy. Not only does it increase the chances of a successful settlement, but it avoids wasting time and money for all involved. By integrating steps into the litigation process that pave the way for mediation, parties and their counsel can ensure they are preparing for success at the mediation table.