How you can settle your lawsuit quickly

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Business litigation is an expensive process. Indeed, it is now common for parties to spend years producing documents, attending depositions and arguing motions, all of which happens before reaching a trial. As a result, experienced executives and in-house counsel often want to know how they can promptly settle a dispute on favorable terms.

Smart Business spoke with Richard L. Miller II, a partner at Novack and Macey LLP, about settling a lawsuit on the best terms possible.

What is the secret to settling a case?

In a word, information. In order to settle a complicated case, it's important for an executive to know four things. First, he or she needs to know the facts. What do the key documents say and what will the players actually testify to? Parties are commonly surprised by such things as: a third party's recollection of what happened; a damaging email that they did not know existed; or the meaning of an overlooked contract provision.

Second, it's critical to know the law. The law will tell you what claims, counterclaims and/or defenses you have. But there are two sides to the majority of business disputes that make it to a courthouse. In order to make sound settlement decisions, you will need straight advice from a seasoned litigator about the likelihood of prevailing on each claim or defense.

Third, it's vital to understand the motivation of the other side. Many times, people think that business litigation is purely about dollars. This is usually not the case. For instance, is the opposing entity in dire financial straits such that it simply cannot pay the amount? Or, does the opposing party fear having its conduct or practices publicized in the course of litigation? All too often, parties incorrectly assume that they know what is driving the opposition's decisions.

Fourth, have a clear and realistic sense of your tolerance for risk and uncertainty. It commonly takes two to four years from the time a case is filed until a jury renders a verdict. After that, the loser may appeal. The appeal could result in a second trial or yet another appeal to a higher court. This process can be a roller-coaster ride — particularly if a judge makes a bad ruling, new evidence is discovered or key witnesses become unavailable.

What are a few common mistakes you see when parties are trying to settle?

One common mistake is rushing the process. It's natural for busy executives to desire a fast resolution. However, at the same time, most decision-makers are loath to take a 'first offer.' Consequently, several counteroffers are often necessary. This back-and-forth usually takes at least a few days and, more likely, a few weeks. If your opposition senses that you need a quick settlement, it will attempt to use that information to its advantage.

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Another mistake is overreaching. At the outset of a dispute, less experienced negotiators sometimes make an outrageous demand. This can stiffen the resolve of the recipient. Then, the overreaching party finds it difficult to make a reasonable offer without losing all credibility. Consequently, the parties proceed with litigation. This problem can be avoided by making demands and offers within the realm of reason.

A third mistake that's frequently made is not understanding damages. In order to obtain a monetary award, you must have a legal theory that entitles you to relief. For example, if a former employee steals a customer list, you probably will not be able to obtain a money judgment if you cannot prove that the employee used the list, or shared the list, in a way that caused you to actually lose a sale or customer.

Are settlement conferences with judges effective?

It depends. If the parties and their attorneys are reasonable and experienced, a judge rarely tells them something that they do not already know. However, this is frequently not the case. In such instances, the right judge can be of tremendous assistance.

If the plaintiff is behaving outrageously, the judge can tell that person that his or her case has serious weaknesses and that his or her settlement position should be adjusted accordingly. Likewise, if one of the attorneys is not giving his or her client good advice, a judge can offer a fresh perspective.

Because judges are impartial and imbued with authority, litigants will often accept advice or arguments from them in a way that they will not from either opposing counsel or even their own lawyer. Still, some judges excel at resolving cases, while others do not.

In order to truly add value, a judge must become familiar enough with the evidence to be able to express opinions on the parties' legal theories and settlement positions. Merely giving a canned speech about the costs and uncertainties of litigation rarely adds value.

Are written settlement agreements worth the time and expense of preparing them?

Yes. If a case was worth litigating, it is surely worth sewing-up with a written settlement agreement. Remember, the attorney who handled your case is already familiar with your business, your adversary and your concerns. Now that he or she has that knowledge, spending a bit more to protect your rights is a sound investment. Moreover, the best person to protect you against future litigation is someone who litigates for a living — we know all of the tricks of the trade.

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