Settlement Tactics in US Litigation

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A Note explaining the principal factors that can help counsel decide whether, when and how to settle litigation proceedings.

This Note discusses some of the factors that can help counsel decide whether, when and how to settle litigation proceedings. In particular, it details the factors counsel should consider when contemplating and advising on the benefits and disadvantages of settling a dispute. It also offers ways to successfully present and correctly time a settlement offer. For a detailed list of issues to consider when drafting a settlement agreement, see Settlement Agreement Drafting Issues Checklist (http://us.practicallaw.com/2-501-1790).

DECIDING WHETHER YOUR CLIENT SHOULD SETTLE

Determining whether to pursue litigation or consider settling involves many complex issues, not all of which are known at the outset of a dispute. The main concerns counsel must deal with when considering whether to settle are described below.

YOUR OPPONENT’S RESOURCES

If you are representing the plaintiff and the opposing party has limited financial resources, it may be better to settle soon after the dispute arises instead of later, especially if you anticipate incurring significant costs litigating the dispute (for example, with discovery expenses). Pursuing a lawsuit may result in a Pyrrhic victory, where your client wins but at considerable cost. For example, a long, drawn out litigation may result in your adversary being unable to pay a money judgment awarded to your client, including your client’s legal costs (assuming fee shifting is even possible).

Similarly, it may not be worthwhile litigating a case against an opponent with extensive resources who can afford the high costs of litigation if your client cannot. In this case, you may want to create an incentive for speedy resolution by offering to settle for less than the full value of the claim (if the settlement value is reasonable).

If, however, you represent a defendant with substantial resources and the plaintiff has limited resources, you may want to litigate and not settle.

YOUR CLIENT’S RESOURCES

Considering your client’s financial resources, examine whether it may be better to settle up front, with little litigation expense. Think about which is the better (and cost-justified) strategy:

- Pursue or defend your client’s rights with the goal of achieving a more favorable result on the merits.
- Put your client in a more favorable negotiating position with the opposing side.

AMOUNT AT STAKE

At the outset of the dispute you should conduct a cost/benefit analysis that takes into account the:

- Potential litigation results.
- Potential settlement outcome.
- Near-term and long-term costs.

Review and update this analysis periodically and when any relevant changes emerge concerning your client’s or the
opponent's bargaining position. It may be worth settling a case if the cost of litigation far exceeds the sum at stake.

CURRENT AND FUTURE LITIGATION EXPENSE
Consider and compare the cost and likelihood of obtaining a return for your client now against the risks and anticipated return of a future settlement or verdict (taking into account the additional litigation expenses involved and the ones your client has already incurred). In light of how quickly litigation expenses escalate, your client may be saving money in the long run by settling early, even if it has to pay a large amount to end the dispute.

MANAGEMENT TIME
Consider the burden, expense and opportunity costs to your client's management and employees if they must devote substantial time and other resources to support the litigation. Corporate employees involved in litigation can typically lose a significant amount of work time to locating, collecting, reviewing and producing records requested for discovery, as well as the additional time spent preparing for depositions and/or trial. All these factors can have a negative impact on the company's overall productivity.

MERITS OF THE CASE
You should periodically assess and report to your client the factual and legal strengths and weaknesses of the case. These analyses typically evolve over the life of a lawsuit and should include, for example:
- Findings made through discovery requests.
- Projected expenses for additional necessary investigations and document review.
- Deposition results.
- Witness credibility assessments.
- Rulings on any pre-trial motions.
- New court decisions related to the case's subject matter.

EVIDENTIARY PROBLEMS
Determine whether the client's case has evidentiary problems, the extent to which the case suffers from them and whether they can be overcome. Consider whether the client's case is dependent on information possessed by others and, if it is, whether you can obtain it. Estimate how expensive it may be to access and obtain it. Examine any admissibility issues and whether they can be resolved. Keep in mind that your opponent may try to bog you down with expensive and time-consuming motions practice over discovery and your ability to use certain evidence.

DISCOVERY ISSUES
You may not want to disclose certain potentially damaging documents that are otherwise discoverable if your client pursues the litigation. This factor alone may be reason enough to settle.

PUBLICITY AND PRECEDENTS
Your client may be highly motivated to settle if it is concerned about the publicity associated with a public trial or if there is substantial risk that an unfavorable decision may lead to additional claims (see Practice Note, Managing Litigation PR (http://us.practicallaw.com/0-101-7801)). This concern may also impact your client's negotiating leverage. Likewise, if your client is concerned that a settlement may attract more litigation, it may be less inclined to settle. If your adversary faces these issues, your client may have substantial negotiating leverage.

RELATIONSHIP OF THE PARTIES
Consider the ongoing relationship of the parties and the relationship your client wants them to maintain in the future. Determine whether there are commercial benefits to an amicable settlement. Try to devise a way for there to be a strategic component to the settlement considering, and perhaps even advancing, the current business relationship (see Maximize Collateral Benefits). This requires creativity and considerable discussion with your client.

OTHER COMMERCIAL CONSIDERATIONS
Examine other commercial reasons for settling the case. For example, the dispute may have a negative impact on your client's business in ways beyond the pending lawsuit, such as:
- A drop in stock price.
- Disruption of on-going business relationships.
- Inability to secure funding or investors.
- Negative impact on insurability.
- Reduction in key employees' productivity.
- Loss of any potential business advantage achievable through settlement.

DECIDING WHEN YOUR CLIENT SHOULD SETTLE
If there is a high probability that your client may settle, it is generally better to finalize the terms quickly, before additional legal costs are committed and the parties' positions become too entrenched. While the prospect of settlement should be evaluated throughout the life of a dispute, there are several factors to consider in connection with the timing of a settlement.

BEFORE PROCEEDINGS BEGIN
Settling the dispute as soon as it arises can be advantageous to both sides, mostly because of the cost savings involved in avoiding discovery and related attorney costs. This is particularly appropriate where maintaining the relationship between commercial parties is a priority, before the situation becomes irreversibly adversarial. To initiate settlement talks at this stage of a dispute, address the parties' long-standing
生意关系，如果他们有，以及您的客户对继续的关系的兴趣。强调双方利益的持续性以及双方如何达成一致的解决方案，可以保持双方利益的成果，从而解决双方在继续的过程中所面临的利益。

**AFTER PROCEEDINGS BEGIN**

当代表一方时，您可以通过通过您的客户在开始正式法庭程序之前提出和解杠杆来给予您的客户谈判的杠杆。您可以通过示证来实现这一点，即在您的案件中，您的客户认真寻求保护其权利，并且通过在清晰的术语中陈述以下内容来实现这一目的：
- 它打算通过任何索赔来实现什么。
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从被告的角度来看，等待进行和解对话直到法院程序开始，迫使原告在过程中承担起诉、准备、提出和解答诉讼和索赔的责任。等待也可以澄清原告的诉讼和解答诉讼的目的，并为被告提供机会来评估范围、性质和原告的索赔。

**DISCOVERY**

发现是诉讼中成本最高的一部分。每方的相对发现负担应予以比较，并加权到诉讼分析中。为此，您必须评估您的立场，以及您是否有将发现的费用纳入您的诉讼策略的必要性，以便进行和解对话。在完成诉讼的过程中，您应考虑提议与您的对手达成协议，以避免进一步的诉讼发现。

**DEPOSITIONS**

准备、作证以及进行监听程序是耗费时间和资源的。在完成诉讼分析时，您应考虑进一步的诉讼发现，正在考虑是否值得进行进一步的诉讼发现。您应考虑以下几个方面：
- 任何索赔的强度。
- 您与客户的沟通程度。

**ON THE EVE OF TRIAL**

成本在开始诉讼之前迅速增加。考虑在这些成本之前是否存在战略机会来推进和解对话。但是如果和解发现可能会加强您的客户在法律或事实方面的立场或法律地位，那么使用您的发现的额外和解策略可能得到加强。

**ON THE COURTHOUSE STEPS**

偶尔，各方在开始诉讼之前可能同意进行和解。您必须评估您的客户在诉讼中的位置，以及诉讼的强度。您的客户可能受到的影响可能受到陪审团的影响。
- 开庭陈述的演示。
- 法官的气质。
- 对方有效反对的律师。
- 证据进入案卷。
- 法官和/or陪审团对见证人和/or证据的反应。

您应考虑所有这些因素，以及其他因素，当决定是否在诉讼过程中继续诉讼发现时。

**DURING TRIAL**

诉讼的前景不一定会结束。您必须评估您的客户在诉讼中的位置，以及诉讼的强度。您的客户可能受到的影响可能受到陪审团的影响。
- 法官的气质。
- 对方有效反对的律师。
- 证据进入案卷。
- 法官和/or陪审团对见证人和/or证据的反应。

您应考虑所有这些因素，以及其他因素，当决定是否在诉讼过程中继续诉讼发现时。

**AFTER TRIAL, PRE-JUDGMENT**

各方可能选择在证据发现部分之前达成和解。根据案件的性质，双方可能希望考虑达成和解。例如，一方可能想在听说案件可能引发的法律上诉之前达成和解。这种情况下，各方可能选择达成和解，以达成对法律或法律的和解。
- 任何新的法律，如果有，是否可能有助于您的客户。
- 辩方律师。
- 合同的构成。
- 待审的和/or陪审团。
- 证据形式和陪审团的选择。

您应考虑所有这些因素，以及其他因素，当决定是否在诉讼过程中继续诉讼发现时。

**POST-JUDGMENT, PRE-APPEAL**

如果诉讼案件在上诉之前未被判决，或者在法院判决之后。如果诉讼案件在上诉之前未被判决，或者在法院判决之后。如果诉讼案件在上诉之前未被判决，或者在法院判决之后。如果诉讼案件在上诉之前未被判决，或者在法院判决之后。如果诉讼案件在上诉之前未被判决，或者在法院判决之后。
ACHIEVING A FAVORABLE SETTLEMENT

Regardless of when parties have settlement talks, the primary objective is usually to end the dispute. To achieve this in the most favorable way for your client, you should assess the strengths and weaknesses of all of the parties’ positions accurately. In addition to your analysis of the material facts and controlling law, there are many other factors to consider. A few examples are discussed below.

PEOPLE AND PERSONALITIES

Consider who is driving the decision-making process. You must understand and assess the individuals involved in the settlement decision-making process. To determine whether they are the right people to be involved in the settlement negotiation, you need to know what their primary objectives are and whether they have:

- The necessary authority to reach a settlement.
- Sufficient knowledge of the facts and legal issues.

Find out whether any individuals are fact witnesses to the underlying dispute and, if so, whether they are too close to the issues to be effective in the settlement process. In domestic and international disputes, sensitivity to the cultural, ethnic and local expectations of the individuals involved can be beneficial. Consider whether a principal of the client or counsel should be the principal representative in the settlement process.

INSTALLMENT PAYMENTS

Where a settlement most likely will result in financial payments to the plaintiff, installment payments may achieve an overall greater recovery if the defendant cannot pay the entire judgment up-front.

MAXIMIZE COLLATERAL BENEFITS

Occasionally, new business relationships can be tied into a settlement so that the agreement can be viewed (and publicized) as a win-win situation. Examples of this type of arrangement include:

- Having one of the parties become the distributor or supplier for certain products that were in dispute.
- Having one of the parties become a licensee/licensor of intellectual property that was in dispute.
- Creating a joint venture relative to the matter in dispute.
- Creating a new employment arrangement for a former or prospective employee.

CONSIDER NON-CASH ALTERNATIVES

If the parties cannot agree on a cash payment to settle the dispute, consider non-cash alternatives to provide value to the opposing party. This type of arrangement can be done by offering non-cash assets (for example, free or discounted goods that the opposing party needs) and/or by agreeing to engage, or refrain from engaging, in certain conduct.

RELEVANT INSURANCE

The availability of insurance coverage for a liability can help or impede a settlement. The party that pays to settle a dispute must fully understand the extent to which insurance will provide coverage for the payment. That party must also ensure that its insurance carrier is fully informed about the imminent demand for coverage.

In addition, you must have the guidance of a lawyer experienced in dealing with insurance carriers if and when settlement is discussed with insurers. No matter how well the underlying settlement is handled, all of that effort and work can be undone if the insurance carrier funding the litigation is allowed to slip away. For more information on insurance companies’ coverage of litigation costs, see Article, Minimizing Litigation Costs by Maximizing the Value of Insurance Coverage (http://us.practicallaw.com/8-502-7415).

TAXATION

You must discuss with your client the tax implications of a financial payment to settle a claim, regardless of whether your client is paying or receiving the settlement proceeds. Consult a tax specialist if necessary, such as any time you do not fully understand the tax implications of a potential settlement. The timing of a settlement payout, as well as the jurisdiction in which the payment is made, may impact the way tax authorities treat it. Keeping these issues and local laws in mind, you may want to delay, accelerate or split up the settlement payment, or arrange for a specific country or state for payment transmittal, to avoid any unwanted tax consequences.

LEGAL COSTS

Commercial contracts occasionally provide the prevailing party with the right to recover its legal costs. If your client must pay the opposing party’s legal costs, request detailed breakdowns of the fees so that your client can assess their reasonableness and possibly negotiate a lower amount to be reimbursed. If paying the opposing party’s legal costs becomes sticking point, restructure the settlement terms in a way that reduces or eliminates their impact. The attorneys involved in settlement negotiations are often the only participants in the settlement process who can diffuse the parties’ emotions tied to these issues.
SETTLEMENT AGREEMENT
Consider whether you want to have primary control of the structure and format of the settlement agreement. If it is important to your client, seize the opportunity to prepare the initial draft from which the parties will further negotiate the terms (see Standard Document, Settlement Agreement and Release: A US Example (http://us.practicallaw.com/2-503-1929)).

FORM OF THE OFFER
In addition to engaging in traditional confidential settlement discussions, there are several ways for parties to present a settlement offer in a way that exerts more pressure on the opposing party. Some of these ways are described below.

FEDERAL RULE OF CIVIL PROCEDURE 68
Tendering a settlement offer according to Rule 68 of the Federal Rules of Civil Procedure places the offeree at risk of incurring the offeror’s litigation expenses (such as attorneys fees and discovery costs) if the offeree does not accept the offer and the judgment ultimately is not more favorable than the unaccepted offer. Several states have similar procedural rules, including New York, Pennsylvania and Tennessee (C.P.L.R. §§ 3219-21, Pa. R. Civ. P. 238 and Tenn. R. Civ. P. 68). Pennsylvania’s rule precludes the plaintiff from obtaining delay damages for the time the offer was pending.

OPEN OFFER BEFORE THE COURT
To the extent settlement discussions are overseen by the judge or other judicial officer, making a formal offer in a court setting can have a positive impact for a party in two ways:

■ It can demonstrate to the court the reasonableness of its position.
■ It forces the opposing party to engage in the dialogue or risk appearing unreasonable.

However, you must balance these potential positives against the risk of the court construing a party’s offer as a sign of weakness.

FEDERAL RULE OF EVIDENCE 408
Regardless of where or how a settlement offer is made, keep in mind that in federal actions, Rule 408 of the Federal Rules of Evidence, which prohibits the use of settlement negotiations at trial to prove liability, applies regardless of whether it is expressly referenced in a settlement-related communication (an offer or counteroffer).

MULTIPLE PARTIES
All of the above considerations apply whether there are only two parties to a dispute or more than two parties. However, several additional considerations are worth noting in multi-party disputes.

RELATED PARTIES
Consider whether any of the parties to the dispute are connected and, if so, whether their relationship is significant to the dispute. Determine each party’s potential liability exposures and obtain details on their financial resources. Find out whether their interests are aligned so that they are likely to coordinate their strategies and pool their ideas, information and resources.

DIVISIONS OF LIABILITY
There is often a tension between focusing on the total amount your client may want to recover and negotiating individually with opposing parties to establish their individual share of liability. Picking off and settling with individual defendants (commonly known as the “divide and conquer” strategy) can be effective. It can put additional pressure on defendants who are unwilling to engage in a meaningful settlement dialogue. Occasionally, it can result in a more favorable outcome overall than trying to achieve a single net result by negotiating collectively with all of the parties simultaneously. And if the case involves personal injuries, you should consider whether a joint tortfeasor release is appropriate or necessary.

SIMILAR CLAIMS AGAINST ADDITIONAL PARTIES
When representing a plaintiff who may have similar future claims against other parties, ensure that the settlement agreement is not drafted so broadly that these potential future claims are also released. It may be appropriate to include an express reservation of rights against all non-parties to the agreement. For an example of this type of provision, see Standard Document, Settlement Agreement and Release: A US Example (http://us.practicallaw.com/2-503-1929).

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