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First Across the Finish Line: Best Practices for Early Settlement

by Donald Hamman & Eve Brackmann, Partners, Stuart Kane LLP

"To finish first, you must first finish."
– Rick Mears

Stuart Kane LLP

A few months ago, a business litigation case filed in March 2016 was set for trial in November 2017. The judge apologized for the delay, noting the court's log-jam resulting from longstanding, gross underfunding. It's a familiar refrain, as is "Justice delayed is justice denied." As a result, litigation costs are skyrocketing.

Done properly, early settlement saves money and energy better used elsewhere, creating a huge "win" for the company. Or as a client once aptly said, "The best lawyers get rid of the lawsuit before it is filed."

But to win, you need a game plan.

1. Contract Stage
When drafting a contract, imposing mediation as a condition for recovering attorney fees can get everyone to the table before budgets are busted. And although not a panacea, requiring binding arbitration may help, too. Commercial leases, for instance, routinely require mediation and then arbitration to resolve disputes.

2. Early Investigation and Claim Evaluation
Early, thorough investigation allows for proper claim evaluation. This in turn facilitates strategic planning, often leading directly to early settlement. Tolling the limitations period can help create more time for this. Also, it is important to distribute an internal litigation-hold memo at this early stage, often before any litigation has even been filed, so that important documents are not deleted or otherwise lost.

The investigation should gather not only the substantive facts (who, what, where, and when), but also the motivational facts (motives, fears, private agendas, etc.). For instance, in a construction-related dispute, a frank conversation at an early site inspection might reveal a plaintiff's strong preference for an aesthetically pristine headquarters now, rather than waiting two years for a damages award. A fast settlement for repair or product replacement could result, saving a relationship and avoiding hundreds of thousands of dollars in fees and countless hours of employee time.

Depending on the size of the dispute, the company may need to consider hiring an outside vendor to identify and garner key documents and other data (preserved as a result of the early litigation-hold memo). "A well-executed data analysis and search can help identify the smoking gun out of tens of thousands of documents and force an early settlement," says Chris Manderson, former public company general counsel, now COO of Franklin Data.

Also, providing the other side with a "free peek" at your evidence might entice a negotiated resolution, or at least evoke reciprocal sharing and discussion. It can also later help maximize recovery of attorney fees or even support a malicious prosecution action, if settlement efforts fail.

At this point, a frank assessment of the case and candid discussion between attorney and client is key. "An effective litigator and valued advisor will have this conversation with the client at the earliest juncture possible, and not at some late date after expensive discovery is concluded or on the eve of trial," notes Daniel Day, Vice President of Litigation and Regulatory Compliance at Albertsons Companies.

3. Litigation Planning
Once investigation and claim evaluation are complete, or at least well underway, it is time for strategic litigation planning.
- ▶ Can a prevailing party recover attorney fees?
- ▶ Should we send a message or is confidentiality important?
- ▶ Do the parties need each other in the future?
- ▶ What's the likelihood of success?
- ▶ Are there cash-flow issues or strategic business concerns?
- ▶ What are the adversary's motives, goals, and pressure points?

"Understanding the business objectives early is key, and also getting consensus from senior leaders in the company for the path forward," says Colleen Nissl, General Counsel of NetJets, a subsidiary of Berkshire Hathaway.

Identifying objectives then leads to determining the next steps, such as agreeing to mediation (privileged), arbitration (confidential), or instead litigating publicly, aggressively, and perhaps even racing to the courthouse to file first.

4. Negotiation
Now it's time to come to the table. Experienced negotiators usually follow the same initial three steps for every negotiation: (1) identify both sides' leverage and objectives, (2) gather as much information as possible, (3) strategically share key information.

Whether in mediation or less formal negotiations, both sides' leverage and objectives drive the outcome. Information is leverage. So this is where your thorough, early investigation pays off in spades.

In identifying leverage and objectives, pre-negotiation, spend sufficient time understanding what will result if either side walks away, and the various alternatives. "This helps calibrate negotiating teams so they don't overshoot or undershoot often based on emotion, when considering concessions and compromise," comments Gil Labrucherie, Senior Vice President & Chief Financial Officer for Nektar Therapeutics (Nasdaq: NKTR). "In preparing, I think this is where it helps to bring in as many different perspectives as possible to brainstorm creative solutions," Labrucherie adds.

Once you have gathered as much information as you can from your adversary (either directly or through the mediator) you can start strategically sharing key information, if it is likely to advance your objectives. This is where you display enough leverage and credibility to settle the case on advantageous terms. Here lies the art of negotiation and it takes practice, but the above basic steps provide a reliably good start.

Setting up a successful mediation also takes some practice and skill. There are a few fail-safe keys to keep in mind, however, particularly when negotiating in the context of early mediation or a settlement conference without the helpful pressure of a looming trial date:
- ▶ Success has a higher probability if both sides respect the mediator, so find one who comes highly recommended, and consider agreeing to the other side's suggestion.
- ▶ Take charge gracefully and gain early momentum by coming prepared with an agenda and a presentation.
- ▶ Make the mediator (or settlement judge) work. Ask for information to support the other side's position. If negotiations have stalled, ask for a mediator's proposal, or request a meeting with the neutral and only lawyers and/or experts. Make sure the mediator is relaying to the other side the key facts and other leverage items that you want disclosed.
- ▶ Avoid buyer's remorse by bringing a draft settlement agreement with you on a thumb drive. Once you settle, it can be edited, printed, and signed on the spot.
- ▶ Protect any progress. If you can't settle that day, at least consider a partial resolution, agreement on initial steps, exchange of key documents, setting key depositions to happen soon, or just finding some common ground.
- ▶ Do not be afraid to walk away from any negotiation, ideally before terminally offending anyone.

Overall, to be first across the finish line and achieve that early settlement requires moving early and fast. Building pre-litigation alternative dispute resolution (ADR) requirements into the contract is the earliest step the company can take, but parties can agree to mediation or arbitration at any time. If a dispute does occur, the company should immediately investigate, evaluate, and form a plan of action, paving the way for successful early settlement negotiations.

Donald Hamman
Mr. Hamman is a founding partner of Stuart Kane LLP. He has served clients as a trial and appellate attorney for more than 35 years with experience in mediation, binding and non-binding arbitrations, settling cases, and handling writ, jury and bench trials and appeals in complex business litigation, real estate litigation, employment litigation and environmental disputes. His clients are corporations and individual business owners in a variety of industries such as real estate, venture capital, banking, design professional firms and other professional service providers. Mr. Hamman can be reached at 949.791.5130 or dhamman@stuartkane.com.

Eve Brackmann
Ms. Brackmann is a partner with Stuart Kane LLP. For more than a decade, Ms. Brackmann has focused her practice on business and real estate matters, with particular expertise in real estate and business litigation. While an aggressive litigator and winning appellate practitioner, Ms. Brackmann also has an excellent settlement record. She has obtained highly favorable settlements for her clients through both mediation and informal negotiation, prior to incurring the expense of prolonged litigation, arbitration or trial. Ms. Brackmann can be reached at 949.791.5198 or ebrackmann@stuartkane.com.

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