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Early Case Resolution: Be a **Great Advocate** by **Not Litigating**

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It goes against our nature as litigators, but settling a case before, or at the inception of, litigation is often in everyone's best interest. Given the growing costs of litigation, the scales may tip in favor of trying to resolve a case in its earliest stages more frequently than clients—or litigators—realize. In my practice, I have found four key steps to early resolution and evaluating its advantages.

Step 1: Eliminate the emotions.

This holds true for lawyers and clients alike. Before even analyzing the numbers and other practicalities, the emotions must be reined in. This starts with the lawyer. Some litigators will view it as a sign of weakness if they initiate settlement discussions. It is not. Move away from this type of thinking. And don't let pride get in the way. Perhaps you are concerned that a client will think you are weak or do not believe in their case if you suggest settlement right off the bat. They probably will not.

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Most clients want issues resolved sooner rather than later. But even if the client seems to have an anti-settlement mentality when they walk into your office, it is up to you to provide the client with a balanced perspective of the options.

Some litigators feel they need a client to see them in action in the courtroom in order to understand what a valuable attorney they are. But that is not necessarily true. I have found that you are just as likely to maintain

a client relationship by getting things resolved early, as showing off litigation skills in the courtroom. Yes, we are trained to be advocates. And, yes, we are ready for the good fight. Sometimes this will mean a fight all the way to the courthouse; but other times, it will mean settling the matter as quickly as possible—on the most favorable terms you can achieve.

The more difficult emotions to reign in are the clients. Whether they are an individual or a company,

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emotions are almost always involved. More often than not, I have found that my client believes in no uncertain terms that he or she is right. Litigation may not, however, be that black and white. Even if they are “right” about their legal position, the cost of litigation may not be worth it. Rational minds, unencumbered by emotions, are required.

Step 2: Realistically consider the monetary and other costs of litigation.

Litigation is unpredictable by its nature. We can hope to anticipate our adversary’s next steps, but there are too many variables: witness availability, court scheduling, adjournments, motion practice—the list could go on. There is also the big variable of how long it will take to litigate a matter to conclusion. More and more, the norm has become a matter of years. And if your client is the plaintiff, there could be collection issues to consider. All of this can increase the dollars it will take to maintain or defend a lawsuit.

Electronic discovery has also contributed to the increase in litigation costs. In many cases, given the sheer volume of email and other electronic information, the cost of collecting, reviewing, processing, and producing electronic documents can be cost prohibitive. Issues of cost shifting may come up, which can lead to more motion practice—and more costs. With all of these variables, in order to be realistic about the risks, once you sit down and make a lean litigation budget, double it!

Non-monetary considerations should also be considered. This includes, for example, the emotional toll a lengthy litigation may take on a client, how well a client will handle

providing testimony at deposition or trial, and how the litigation will impact a client’s career or business. Bad publicity can be detrimental to an individual and business alike. And in today’s age of social media and the Internet, information about litigation is even more readily available to the public. A good litigator will evaluate all of this with her client before, or at the beginning of, any litigation.

Step 3: Evaluate the merits of the case sooner rather than later.

All lawyers execute some form of case evaluation either before bringing a lawsuit or when a client is served with a complaint. My advice here is to dig a little deeper than you

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usually might. If early case resolution is to be achieved, you will be in the best position to negotiate if you have a full understanding of the facts and issues of the case. This may mean reviewing certain documents earlier than the usual timeframe or conducting some early research on key issues. Spend the time upfront to potentially avoid greater costs later.

It can be difficult to settle and walk away from a claim or defense before we have a full picture. And with early settlement discussions, the likelihood is you will not have the whole

story yet. Discovery is yet to be exchanged and no depositions will have taken place. So there definitely may be gaps of information. This is not the most comfortable position for a lawyer or client to be in when beginning settlement talks. That’s why it is so important to crack into what is available to you as early as possible. And remember, your adversary hasn’t had the benefit of such discovery yet either. So it is possible depending on the framework of the case that you are both equally disadvantaged.

Step 4: Know the difference between fruitful and fruitless negotiations.

Once you’ve decided that resolving the case early, or trying to, is the appropriate strategy, it is time to execute. Whether you will be successful will depend a lot on the opposing party—and their attorney. Pay attention to your adversary’s cues. If they are not interested in a reasonable settlement or are merely looking to debate the merits in order to learn the case from you or get early insight into your strategy, move on. It is not the right time. Resolution will only be successful with another attorney that understands the risks and costs of litigation.

Sometimes, litigation will be the only option. Perhaps down the road there will be the usual twists and turns that open a path for settlement negotiations again. Just keep an eye open for that opportunity and be sure to seize it. Until then, it is time to show off those litigation skills.