Insights into Best Pre-Litigation Negotiation Practices

Sarah Sawyer: Welcome to this week's OK at Work with myself, Sarah Sawyer, my colleague Russell Berger, both attorneys at Offit Kurman, and today we are talking about negotiations, generally as it relates to pre-litigation and when you're trying to resolve an issue. So a lot of times before you go straight to litigation and say, I'm going to sue someone for breach a contract, or we enforce a contract, or any plethora of different things that could mean that you're trying to seek a resolution on in some type of conflict.

There might be pre-litigation, pre-op option negotiations that you need to go through to try to say, all right can we resolve this in a way that is maybe not, going through a full process of having to fight it out, right? But there's a lot of things to consider in those pre-negotiations and conversations and process.

It can be a really short process or it can be a really long process. It can be a little stressful, [00:01:00] it can be emotional, it can be really challenging. I know Russell, you and I do a lot of it obviously for our clients so we're pretty used to it. But for those who are not as used to pre conflict or I guess it's, I would call it pre conflict because the conflict's already usually happening, pre-litigation negotiations.

What should anyone be considering?

Russell Berger: Yeah. Well, I think you've summed it up well to say that it's a process. I think it's, often like buying a car is a negotiation and most people are not too thrilled to go through that process. They want the car at the end of the day but they've gotta go through the process. And this is a process and there'll be ups and downs to it, and there's things that create leverage and things that you have to deal with along the way. Now what I would say is a starting point though is that there's no one size fits all approach like that doesn't work.

I think there's, general concepts of, Hey, we want to present the strongest case that we have and we want to articulate our position and we want to demonstrate that we're willing to fight on this if we don't get an [00:02:00] acceptable deal. Those are the kinds of things that generally create leverage.

But how you do that when you do that, what tactics you implement to express that are all gonna be very case specific. And, I like to think of it as, it's obviously different than playing poker against somebody, but it's similar in the concepts of, on the one hand you have to understand the cards that you're holding.

How strong am I approaching this? What are my strengths, what are my weaknesses? What are my odds of success? What are my likely outcomes? But I also think it's important to understand who you're playing against across the table and what are their biases? What are they looking for?

What are their strengths and weaknesses? Where do they leave us with opportunities to create leverage? And you take all those things and throw 'em in the pot and knowing that the more leverage we create, the more likely we are to get a good result. And you just have to play all these pieces together.

So from a process standpoint, step one is just gather up all the ingredients and start figuring out what you can make with them.

Sarah Sawyer: Yeah, and trying to approach it [00:03:00] objectively can often be really challenging because I think when we encounter folks at this stage in the process they have certain feelings around the way that things should play out, and usually they're informed by the facts.

And by a lot of the factors that you described, Russell, that you wanna be considering. But there is some feeling of how to, you think things should play out how you want them to, what's just, and what's reasonable. But you also have to layer in, well, what's practical?

What makes sense? What do I really want out of this? Even if it's not a slam dunk and it's exactly what I want. Am I willing to accept something less to be done with this and not have to keep dealing with it? And there's a lot of stages I think for people to go through and as part of that process as well. Everyone's a little bit different, obviously.

No one's the same as it relates to how they might feel or handle or approach something like this. And sometimes people are ready to be practical and logical right from the start, and sometimes it takes a little time. And that's true of both sides. So when you talk about thinking [00:04:00] about your own side and your own approach and trying to be logical and zoom out and really think it through, but also do that for the other side.

And a lot of times our clients will know the people on the other side, obviously better than we do. So I know that's something that I will take into consideration with clients is to say like, all right, well you've done business with this person. What approach do you think they're gonna take?

What's their position gonna be? What are the things that are gonna be most important to them? And sometimes the business owner that we're working with has the best perspective on that.

Russell Berger: Yeah. And we talked about it a few weeks ago when we talked about cease and desist letters. Does being aggressive back them down or does it get them fired up and coming after you even more I think, like I said reading the other side is really important as you decide what tactics to implement and how you plan to get there. I think it's also important to note that, especially in a pre-litigation, pre-suit negotiation context, that you have to be okay with not settling and not getting resolution there.

If you're desperate to get a deal done, you will get [00:05:00] one done, but you'll pay more for it. Just if you go into a car dealership and say, I really gotta get a car this week. My car just broke down. I need something new that dealer's gonna take advantage of you. You want to be thoughtful about that and also mindful that hey, if I can't get a good enough deal, like I'm okay going forward, I'm okay going to the next step. There will be other opportunities to revisit a negotiation and possibly get a resolution. Maybe what I need to do is further this thing down the road and create more leverage and, cause the other side to feel some pressure that causes them to come back to the table and in more spirit of compromise than they might be at the start.

Sarah Sawyer: Yeah, it's good to be prepared to see how that would look, what that would look like if it played out, so that you're prepared for that and comfortable with that. Well, thank you, Russell. We'll see you next time.

Russell Berger: Thanks, Sarah.

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