BEING AGGRESSIVE VS. BEING STRATEGIC

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INSTEAD, MORE CLIENTS SHOULD BE SAYING: "WE NEED TO BE STRATEGIC WITH THIS CASE."

"We need to be aggressive with this matter," says a client who is either in litigation or in the midst of failing negotiations. All too often, what that really means is: "I'm irritated at the other side and want to make their life as miserable as they are making mine."

While this is an understandable sentiment, it is often shortsighted. Instead, more clients should be saying: "We need to be strategic with this case." Let's consider when "being aggressive" might be a good strategy—and when it might be counterproductive.

WHEN SHOULD YOU THINK TWICE ABOUT BEING AGGRESSIVE?

WHEN YOU ARE USING LITIGATION SOLELY AS NEGOTIATION LEVERAGE

In many instances where the "be aggressive" direction is given, litigation is a sideshow to a larger, more important business negotiation. And when those negotiations fail or lose traction, people often think that throwing litigation into the mix will somehow pressure the other side to make a bigger move in the business negotiation.

But filing a lawsuit that has no independent purpose outside of business negotiations rarely works. Instead, all it does is detract the business people from what should be their primary focus: getting a business deal done. Unless the business negotiation is stymied because of some dispute that can only be resolved by litigation—for instance, the validity of a patent or the meaning of a necessary contractual term—litigation, with no other purpose, rarely helps move negotiations forward and may be counterproductive.

WHEN ANOTHER STRATEGY MAY PROVE MORE EFFECTIVE

There are many times during the course of litigation that diplomatic efforts can prove far more effective than firing off the arsenal. Or sometimes keeping a parallel track of diplomatic channels open, even while the arsenal is firing, can be useful. Litigators often see litigation as a zero-sum game—and sometimes it is.

But if you think strategically, there are sometimes options for negotiation during a dispute—even if it does not resolve the entire lawsuit—that can streamline the litigation and perhaps help achieve some of your client's interim objectives along the way. Granted, winning battles doesn't help if you lose the war, but don't forget that some of those battles could be resolved creatively to benefit your client.

WHEN IT COULD RESULT IN MUTUALLY-ASSURED DESTRUCTION

If you get the sense that your attorney is pulling punches, you should definitely inquire further and perhaps push for a more aggressive posture. But be prepared to hear that being too aggressive could boomerang back in a way that will not serve your broader goals. For instance, before you go to the mat in moving to compel the information that you may not really need, ask yourself: are you prepared to face a similar motion?

WHEN SHOULD YOU BE AGGRESSIVE?

WHEN YOU HAVE THE STRONGER POSITION AND WILL GET SOMETHING OUT OF IT

If you have good solid arguments, then you should make them. But you should also ask yourself, what will you get out of it if you win? Don't waste time with pyrrhic victories—make sure that there is a business purpose to either bringing or defending the litigation. Lawyers can win all the motions and trials we want, but if you could have resolved the matter three years earlier for a fraction of what it cost to go to trial, your client may not be impressed with your "win." "Sometimes settlement is winning," says Denise Cade, Senior Vice President, General Counsel & Corporate Secretary for IDEX Corporation. Trial attorneys should remember that.

WHEN YOU ARE OKAY WITH THE COST OF "BEING AGGRESSIVE"

Being aggressive is expensive. Being strategic, on the other hand, necessarily requires a cost-benefit analysis that factors in the cost of the strategy compared to the benefits of the strategy.

If there is not a good chance of prevailing on a motion or it is not going to streamline the case considerably, then perhaps you shouldn't bring it. Being aggressive might entail taking 15 depositions all over the country while being strategic might entail taking only the 3 most important depositions. Yes, there is always some risk in having fewer depositions, but if you focus the case properly, those risks are often outweighed by being surgical with your tactics.

WHEN THE STAKES ARE SO HIGH THAT AGGRESSION IS THE ONLY OPTION

Sometimes the stakes are so high that there is no room for anything less than a full-blown show of shock and awe. A bet-the-company case or a case where there is no middle ground, for instance, may require making every motion available and exhausting all discovery avenues. But even with these cases, there is likely room for strategic and nuanced tactics within the broader aggressive strategy.

In the end, don't mistake bluster for an aggressive strategy. If you want a loud, obnoxious attorney to handle your matter, you'll have no shortage in finding someone. But keep in mind that some of the best strategic moves are stealth ones—ones that your opponent doesn't see coming and may not even realize happened. An effective attorney should be capable of being both aggressive and diplomatic.

Most importantly, your attorney should know when each trait is called for or, better yet, how to exercise these traits simultaneously.

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