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# Beyond the merits: The executive lens on legal disputes

**The legal merits don't always drive litigation strategy. To be a true business partner, counsel must understand the leverage, relationships and commercial stakes that matter to the client.**

By Michael Schwimmer

Imagine the following conversations in which outside litigation counsel makes a recommendation to her corporate client on how to move forward in anticipation of a lawsuit:

*Recommendation No. 1*
*Litigator to corporate executive:* "The facts are bad for us. If this goes to trial, it's likely that we'll lose. I recommend the company try to settle early and get out as inexpensively as possible."

*Corporate executive to litigator:* "I appreciate the advice, but fight like hell and don't give them an inch."

*Recommendation No. 2*
*Litigator to corporate executive:* "We have a great case. I recommend we file the lawsuit, and then try to drive a strong, early settlement or win on summary judgment."

*Corporate executive to litigator:* "I appreciate the advice, but we're going to take our lumps and pretend this whole thing never happened."

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## When the facts and the law matter less

What do both conversations have in common? In each case, the client weighed key business considerations that were unknown to counsel when she made her recommendation. The result was that counsel was left trailing behind the client in both strategy and decision-making. Not a good look for the lawyer.

Neither scenario is merely hypothetical. In my past business roles, my company often had business "leverage" in relationships that gave rise to litigation. In those cases, even if we had a "bad hand," we knew our leverage could help produce an acceptable business resolution of the dispute — regardless of the merits — long before trial. This is what's happening in the first conversation: the executive is confident there will be a settlement; the legal merits will not decide the outcome of the lawsuit.

In the second conversation, the opposite phenomenon is working behind the scenes. There were times I directed counsel to walk away from significant claims that we were well-positioned to win, to preserve the ongoing relationship with the other side because it mattered more to the business than winning in court. A strong hand in litigation can be irrelevant when it comes to claims against a company upon which your business is deeply dependent.

Good counsel knows the law, can advocate effectively and evaluate the likelihood of success on the merits. But these important skills are only table stakes. Both business litigation and settlement strategy are often driven by factors like leverage that are unrelated to the legal merits of the dispute. And these factors make up the "executive lens" through which corporate clients evaluate many disputes.

## Leverage is part of the ecosystem

Every business exists in its own commercial ecosystem. Typical examples include the financial, entertainment and technology sectors, which are filled with companies that have their own level of market share and influence, as well as interconnected commercial relationships with varying degrees of strength, dominance and dependence.

In these relationships, there is a power dynamic — often called "leverage" — produced by who has more money or market share, who pays who for what, who has more customers, how reliant one company is on another and so on. Understanding these details early is essential for counsel to engage as a true partner of clients in business litigation.

## Leverage can come from unexpected places

Years ago, a major television distributor at which I was a senior executive filed a federal antitrust lawsuit against a well-known media company. We thought we had a shot at changing the industry, but the court denied our motion for a preliminary injunction that would have preserved our access to the media company's popular television networks during the pendency of the case. When we were forced to remove the channels from our customers' homes, an extraordinary number of calls from angry customers started pouring in. To our surprise, many were from parents of young children who could no longer watch their favorite cartoons.

So we settled, not based on the legal merits of our claim but because the media company had powerful leverage. We relied on its valuable television programming and could not take the business risk that the programming would not be available for our customers over potentially years of litigation.

This anecdote is really about high "switching costs," the inability of a business to easily substitute one vendor's product for another product in the marketplace due to lack of comparable alternatives, high cost of implementation or other obstacles. In this case, the television distributor could not placate angry parents and solve the problem by licensing alternative programming. The kids missed their favorite shows and characters and there was nowhere else to get them except from the copyright holder.

This kind of leverage is common and can impact both litigation and settlement strategy. There is an inherent power imbalance, or vulnerability, of which the parties will become acutely aware, sooner or later.

## The stakes that matter — from existential to more routine

An exception to the above rule — when the legal merits of the dispute will drive litigation and settlement strategy — occurs when a company's very survival is at existential risk. In these situations, when losing the case can mean shutting down the business, other factors such as relationships and leverage can mean very little. When a business is fighting for its life, facing a potentially devastating lawsuit, it will pull out all the stops, and management will pick up the pieces later if they're fortunate enough to have the opportunity.

Less existential — but still important — stakes often shape litigation and settlement strategies in legal disputes. These stakes may include a company's growth objectives, competitive position, reputation, setting precedent (or not) for similar disputes in the future, and even whether settlement requires board approval. Such considerations — unrelated to the merits of a dispute — will weigh heavily on management's mind and can deeply impact a party's willingness to fight and settlement posture.

## Mediation — where it all comes together

In commercial mediation — under the protection of confidentiality — the underlying power dynamics and stakes for business litigants are typically front and center, so satisfying the parties' business objectives is key to reaching resolution. For this reason, counsel must have a strong understanding of the relevant industry ecosystem and the commercial stakes for each party; ideally this is developed before the complaint or answer is filed, and certainly well before mediation.

If this doesn't happen, counsel may be caught flat-footed by the client's willingness to pursue weaker claims aggressively or to settle for less money sooner, despite strong legal claims backed by convincing evidence. In either case, counsel's ability to see the dispute through the executive lens, in its full business context, will avoid surprises and facilitate better collaboration and advice.

## A business partner, not just a lawyer

It was only after I moved from outside and in-house counsel positions to making decisions in a management role that I understood clearly what I wanted most from our lawyers. Beyond the table stakes of expertise, I realized that I appreciated and needed the lawyer who saw him or herself as part of the business enterprise and was committed to helping the company reach its goals.

This lawyer invests early in understanding both the client's business and the broader ecosystem in which it operates. When a dispute arises, the first question he or she will ask is "How does this dispute impact the company and its plans going forward?"

This is the executive lens. When it is used by lawyers, it creates an immediate sense of teamwork with the client and lays the foundation for building long-term trust and loyalty.

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