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**SOME APPROACHES TO
LITIGATION MANAGEMENT**

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What is “litigation management?” Does the answer depend on whether you are the client, an in-house attorney or outside counsel? Or is it generally a function of the nature of the underlying case? Whether you are the client or outside counsel, and whether the case is a garden variety breach of contract claim or a class action, effective litigation management is the ongoing process of trying to obtain a cost-efficient and favorable outcome. Unfortunately, these seemingly simple objectives are often difficult to achieve. Litigation by its very nature involves numerous variables, many of which are largely beyond the control of the attorney. For example, the factual particulars of a case and what the opposing side does with those facts are matters that cannot be controlled. Despite these “complications” -- which are often what makes what lawyers do interesting -- litigation can and should be managed with the goal of achieving a positive result at a reasonable cost always in mind. This article briefly outlines some approaches to litigation management from the perspective of both outside counsel and in-house counsel.

In the Beginning; Several Things to Keep in Mind

Much of what falls under the rubric of litigation management is really related to client communications. In addition to all of its other benefits, regular and clear communication between outside counsel and the client or in-house counsel are essential to establishing a foundation for effective litigation management. Set forth below are some ideas and tips on how to improve communications with the client.

- *Imagine If You Were the Client*

Try putting yourself in the shoes of the client. To a layperson -- and sometimes even sophisticated clients or in-house counsel -- the options, cost and potential consequences of litigation must seem bewildering or even shocking. How would you feel if you were named as a defendant in a lawsuit that seeks millions of dollars in damages? Or, what if you received a bill for \$25,000 or \$50,000 without really understanding why? Approaching client communications from the point of view of what you would want to know (and why) if you were a client, is a valuable “reality check.” More importantly, it leads to a greater understanding of the client’s concerns, etc., and an increased awareness of the importance of addressing those concerns.

- *Understanding the Facts and What the Client Really Wants*

After first being contacted by a potential client or existing client about a new matter, outside counsel needs to understand the facts of the dispute and the client’s goals as quickly as possible. Unfortunately, this is often easier said than done.

The Facts. The advice of outside counsel is only as good as his or her understanding of the factual background of the dispute. Put another way, “garbage in, garbage out.” For any number of reasons, a client’s initial rendition of the facts often fails to include the so-called “bad” facts and almost never includes the opposing party’s version of the facts. Charting a course of action without knowing what the other side is going to say about the dispute is risky and can frequently lead to expensive mistakes. After the facts are known (or as much of the factual background as can reasonably be ascertained on a preliminary basis), outside counsel is properly prepared to consider the alternatives and provide advice to the client.

The client or in-house attorney should gather as much of the relevant factual background and critical documents as possible before talking with outside counsel. Ask these questions and be prepared to answer them -- What went wrong? When? Why? Who did what? And, importantly, what will the other side say in response to each of these questions? Additionally, consider preparing a chronology of key events and documents. Not only does this assist outside counsel in understanding the facts, but it saves money and may in those cases where time is of the essence (*e.g.*, filing or responding to a motion for preliminary injunction) be the difference between success and failure.

Goals and Expectations. Although this may seem relatively self-evident, it is amazing how often the client (even a client who has a fair amount of experience with litigation) is not really sure what it hopes to achieve through litigation. This, of course, is more often the case when a client presents itself as a potential plaintiff, rather than as a defendant in a recently filed lawsuit. In either event, outside counsel needs to be prepared to sift through the often conflicting goals and expectations of the client to understand what it really wants to achieve. For example, if a potential plaintiff, does the client want to obtain a money judgment, injunctive relief (either on a preliminary or permanent basis), defend an important system-wide issue, and/or a quick resolution of the matter? If a defendant, is the goal to settle the case as quickly as possible, “defend the case to the bitter end,” or obtain some type of affirmative relief based on a counterclaim?

- *Case Strategy -- So Many Choices and Why Things Are Almost Never as Simple as We Would Like Them to Be*

Having parsed through the facts and developed an understanding of the client’s objectives, the next step is to decide what to do. This also is rarely as easy as it sounds. In litigation, especially complex litigation, there is usually no one right answer. Inevitably, there are numerous alternatives to consider. Business, cost, and/or the need to “police” the franchise system issues often complicate the process of developing a successful strategy. Prior to implementing a strategy, outside counsel should outline for the client’s benefit: (i) the available alternatives; (ii) the pros and cons of each of the alternatives, (iii) the range of potential consequences or outcomes related to each of the alternatives; and (iv) a rough idea of the potential cost of each of the alternatives.

Although this seems to be a reasonable enough suggestion, it can get lost in the shuffle. Even if everything seems to be happening all at once and time is short, sufficient time needs to be taken to go through this process. Inevitably, the time will be well spent. Outside counsel and the client will be compelled to think through the problem, rather than simply reacting. Unlike standardized tests, an initial reaction about how to proceed is not necessarily the best approach to litigation. Moreover, the client’s involvement in the decision-making strategy allows him/her to develop an understanding of the inherent uncertainties and vagaries of litigation.

Going through the exercise of explaining the alternatives and likely consequences of litigation is particularly important in cases in which the client is considering filing a lawsuit. The client needs to understand that a lawsuit often, if not usually, precipitates a counterclaim.

Moreover, a counterclaim can sometimes dwarf what is otherwise a simple breach of contract or collection action. Both the client/in-house counsel and outside counsel need to give thought to the following: What sort of claims would the opposing side likely assert? Is there merit to any of those claims? What is the likelihood of the counterclaim withstanding a 12(b)(6) motion or motion for summary judgment? What are the likely costs of fighting the counterclaims? In the final analysis, the potential upside of filing a lawsuit may be far outweighed by the potential downside of having to litigate expensive and troublesome counterclaims that would likely be asserted. In such cases, the best approach to managing litigation may be to simply avoid it altogether.

- *Surprises Are Good for Birthdays, Not in Litigation*

Lawyers, either by nature or training, do not like surprises. The reason for this is simple -- rarely does any good come of them. Virtually every lawyer would rather know if there is a potential "bombshell" in advance of it being dropped on him or her. The problem with surprises and why lawyers do not like them should be explained to the client at the outset of litigation. In this regard, the client needs to understand that until an issue is identified and understood by outside counsel, a strategy for dealing with the issue cannot be developed. The client also needs to understand that a previously unknown fact or piece of evidence can materially impact the outcome of a motion or even the litigation itself. Finally, and significantly, the client needs to understand how surprises can lead to increased costs. More often than not, having such a discussion with the client at the beginning of the case will lead to the revelation of some previously unidentified potential issue.

Given that lawyers do not like surprises, it should be obvious that a client (whether it be a large international franchisor or a single-unit franchisee) feels the same way. With the exception of developing and implementing a strategy for winning, one of the most important things that outside counsel can do is to keep the client apprised of what is happening and what is likely to occur in the near future. We do not, of course, have crystal balls, which also needs to be made clear to the client. Nonetheless, outside counsel should regularly provide the client/in-house counsel with updates and discuss upcoming matters that are likely to require a significant amount of client participation and/or will be costly.

Budgets, Alternative Fee Arrangements, Discounts and Other Often Unpleasant Topics

- *Budgets*

Budgets are here to stay. Although not all clients insist upon them, many do. Lawyers, on the other hand, do not like budgets. The oft-stated reasons for this aversion to budgets are numerous -- *e.g.*, litigation is inherently uncertain and incapable of being predicted with any degree of precision, or a budget will ultimately be used "against" the outside counsel if the costs exceed those set forth in the budget. While there may be some truth to these fears, that does not mean that budgets are *per se* bad. If, as outside counsel, you are not asked to prepare a budget, consider offering to do so or provide some form of cost estimate with respect to particular tasks.

Frankly, budgets should not be viewed as the bane of a lawyer's existence.¹ First, it forces outside counsel to clearly think through what will or may happen in the future, as well as the estimated cost of those events. Second, it is another opportunity to communicate to the client what its options are and the range of potential outcomes -- all of which further informs the client. Although not always the case, an informed client is a happy client (to the extent that there is such a thing in the context of litigation).

Moreover, if you are dealing directly with a client (as opposed to in-house counsel), it is important to remember that they often live in a world of numbers -- forecasts, pro formas, budgets, best case/worst case comparisons, and so on. Expenses, especially "controllable" expenses like litigation costs, need to be quantified to the extent possible and hopefully minimized. Whether it be on a monthly, quarterly or per-case basis, a reasonably accurate forecast of litigation expenses is helpful to the client. Similarly, if outside counsel is dealing with in-house counsel, you should understand that they are regularly called upon by those who run the business to both predict and minimize litigation expenses. While it may be impossible to ever truly satisfy a client's desire to continuously reduce litigation expenses, outside counsel can assist in-house counsel by accurately budgeting some of those expenses. The resulting credibility and trust is often a valuable byproduct of being able to fairly estimate the potential cost of litigation.

What should a budget look like? It depends both on what the client wants and the nature of the litigation. Often, a client requires a budget to be in a specific format and cover particular items. If this is not the case, however, a budget should include an overview of what is contemplated and an estimate of the range of potential costs of the following events/items: (i) initial pleadings; (ii) fact investigation; (iii) depositions and other discovery; (iv) experts; (v) anticipated motions; (vi) legal research; and (vii) ADR.

Despite the fact that some things in litigation can be predicted or at least anticipated, it is often extremely difficult to prepare a comprehensive budget estimating all pre-trial costs early in a case. Given this, unless the case is relatively routine, outside counsel should consider offering to provide a budget for certain initial events and/or a rough estimate of the anticipated costs that will be further refined as the case progresses. This essentially amounts to the budget being a work in progress. Although it may not be as desirable from the perspective of the client, it addresses the outside counsel's concerns that it is difficult to estimate the cost of something as unpredictable as litigation.

Several tips -- do not forget to budget for correspondence with the client and opposing party, as well as necessary inter-office conferences. Inter-office conferences are often perceived

¹ This assumes that the client understands that a budget is only an estimate of the costs of what may occur. Things change and often do not turn out as predicted or hoped for. Using a budget as a "sword" against outside counsel if a specific item or case costs more than originally estimated, or if things go poorly, through no fault of the outside counsel, is unfair and ultimately counter-productive.

as unproductive and expensive. Like everything else in litigation, this is sometimes true. Nonetheless, conferences are often the most efficient way to communicate general information, assign tasks, and develop/refine case strategy as the litigation progresses.

- Alternative Fee Arrangements

Alternative fee arrangements have become increasingly popular and there is much to be said for exploring such arrangements. Although there are countless varieties, the “standard” alternative fee arrangement usually includes a discounted hourly rate (with or without a fixed cap on total fees) and a range of “contingent” recoveries for the outside counsel depending on the outcome of the case. From the client’s perspective, alternative fee agreements decrease litigation expenses, incentivizes outside counsel, and aligns the outside counsel’s financial interests with its own financial interests. From the outside counsel’s perspective, it provides an opportunity to demonstrate to the client that he/she understands the need to control litigation expenses, and is an opportunity to be paid more than his/her regularly hourly rate.²

- Discounts/Blended Hourly Rates/Flat Fees

The old adage that it “never hurts to ask” applies here. Clients often ask for and sometimes even expect a discount on outside counsel’s regularly hourly rates. Discounts are particularly appropriate for long-term clients, a large piece of litigation, when a large volume of cases can be expected (*e.g.*, personal injury or employment disputes), and/or when the discount is tied to a potential upside for the outside counsel if there is a victory.

An alternative to a discount on hourly rates is the use of a blended hourly rate. There are several ways that blended hourly rates can be used. Typically, however, outside counsel agrees to undertake a case or a specific task (*e.g.*, depositions) for an hourly rate somewhere in between the average rate for associates and the average rate for partners.

It has also become increasingly common for clients to request that outside counsel take on specific types of cases for a flat fee. This practice is, not surprisingly, somewhat controversial and seems to be mostly used in “routine” types of cases (*e.g.*, garden-variety personal injury matters). Specific projects can also be done for a flat rate (*e.g.*, a motion for preliminary injunction or a motion for summary judgment).

How to Keep the Costs Down -- Who Does What

Litigation is expensive. There is simply no getting around this fact. There are, however, a number of things that can and should be done to control the cost of litigation. One of the most important ways to manage costs is for the client to take an active role in the case from the outset. Generally speaking, the more input and assistance from a client, the better the result and at a

² Before entering into such an arrangement, outside counsel needs to determine the impact of discounted hourly rates on his or her firm’s profitability.

cheaper price. Set forth below are several areas in which client participation can significantly reduce the cost of litigation.

- Preliminary Fact Investigation

The client or in-house counsel should actively participate in gathering and organizing factual information at the beginning of the case. Not only does this assist outside counsel in understanding the facts of a case and providing more informed advice, but it leads to significant cost savings. There are, of course, limits to what the client/in-house counsel can or should do. Some clients are either too busy or unwilling to take the lead in preliminary fact-gathering. Additionally, outside counsel ultimately needs to be satisfied that the appropriate stones have been unturned. Striking the appropriate balance between the client being totally responsible for the initial fact investigation and no client involvement may be somewhat tricky. However, once that balance is struck, it will ultimately save money.

- Taking and Responding to Discovery

Discovery is the black hole of litigation. Clients must sometimes feel that there is no end in sight. Deciding what discovery is necessary is typically viewed as the responsibility of outside counsel. However, all things being equal, outside counsel almost always will err on the side of too much, rather than too little discovery. This being the case, the client and/or in-house counsel should carefully consider what discovery is necessary and why. Is it necessary to take 10 fact-witness depositions if the dispute is a straightforward breach of contract claim? Or, is it really necessary to propound 100 interrogatories? Will the inevitable disputes -- often culminating in an expensive motion to compel -- and the generally vague responses that are forthcoming, simply make it a waste of time? Prior to embarking on discovery, outside counsel should discuss the options with the client. Of course, like much in litigation, it may be necessary to juggle what the client would prefer (as little as possible) and what outside counsel would like (leave no stone unturned).

Responding to discovery is also an area where the client can both save money and focus the efforts of outside counsel. As a preliminary matter, a decision needs to be made whether to respond to the discovery or, if appropriate, object to the discovery on the grounds that the requests are overbroad, seeks information that is irrelevant, etc. The client and/or in-house counsel should be involved in the decision-making process. Is the discovery worth fighting about? Often, the answer is no. For example, generalized (as opposed to specific) concerns about sensitive or confidential information can usually be resolved by an appropriate protective order. Or, if the information is irrelevant and innocuous, why not simply provide the responses or produce the documents (provided that doing so is not unduly burdensome)?

Once a decision has been made to respond to the discovery, the client and/or in-house counsel should also be involved in gathering the necessary information and/or documents. Of course, outside counsel needs to oversee the process. Nonetheless, much of the preliminary work can be undertaken by the client.

- Documents

Large cases, and sometimes even smaller cases, are frequently document-intensive. It is not uncommon for literally hundreds of thousands of pages of documents to be produced. Who should review these documents? As an alternative to having outside counsel and paralegals perform the work, the client should consider using contract attorneys (if necessary) and paralegals to review the documents. This is especially the case if it is possible to segregate the documents by relative importance. The potential savings by using contract employees can be enormous.

Managing the costs of a document database is more difficult, but not impossible. Whether a document database is required depends, of course, on a number of factors. In larger cases, however, it has become almost routine to use some form of document database. Nonetheless, not every document necessarily needs to be imaged or coded. Additionally, some types of documents may be appropriate for "batch coding." A client's active involvement in the decisions regarding whether to utilize a document database, and if so how, can lead to a sizable cost savings.

- Experts

Expert costs are becoming an increasingly significant part of the overall expense of litigation. In order to minimize these costs, the client and/or in-house counsel should be involved in (i) the process of determining what, if any, type of expert testimony is necessary; (ii) the selection of the appropriate experts; and (iii) gathering the necessary factual information upon which the expert will base his/her opinion.

- Litigation Support -- Wordprocessing, Photocopying, and Facsimile Costs

In large cases, "litigation support" costs can run well into the tens of thousands of dollars. Many law firms charge for wordprocessing time, and almost all law firms charge for photocopying (often in excess of \$0.25 per page) and faxing documents (\$1.00 or more per page). Some clients will either not pay or request a discount on wordprocessing time. Similarly, many clients often insist on a reduction in photocopying and facsimile charges.

Other things that can also be done to minimize the expense of litigation support include asking that outside counsel send large copying jobs (*e.g.*, document productions) to a third-party vendor and that information be sent via E-mail (and not facsimile). While the use of E-mail has become increasingly prevalent, some attorneys continue to insist that it is not secure. Whether E-mail is any more "insecure" than any other type of communication -- *e.g.*, facsimile or U.S. mail -- is debatable. To the extent that there is a potential security issue, it may be because a large number of the client's employees have access to E-mail. If so, this can usually be remedied.

ADR -- The Pros and Cons

Tomes and treatises have been written on the subject of alternative dispute resolution (“ADR”). ADR -- which is generally comprised of arbitration and mediation -- is viewed by some as the perfect tool for litigation management, as well as the answer to all that is wrong with the judicial process (*e.g.*, the seemingly never-ending discovery, out-of-control costs, and the amount of time that it often takes for a case to wind its way through the court system). The truth is somewhat different and a client needs to be made aware of the pros and cons of ADR.

- Arbitration

Arbitration is a mixed bag. Substantively, a party’s appeal rights are generally very limited in the context of arbitration. While nobody really wants to contemplate the prospect of losing at the onset of litigation, the consequences of losing and the resulting rights of appeal should at least be discussed as an initial matter. This is especially true if arbitration is being considered on a voluntary basis. Additionally, arbitration can often ultimately cost significantly more than traditional litigation. While generally not available as a matter of right in arbitration, the parties usually agree to at least some basic discovery in an arbitration proceeding. This usually includes the exchange of documents and expert reports, as well as a limited number of depositions. The more onerous aspects of discovery, interrogatories and requests for admissions, are usually not utilized. Nonetheless, while there may be some savings as a result of limited discovery, these savings often end up being used to pay for the cost of the arbitration itself.

Arbitrators do not come cheap and usually charge anywhere from \$250 to \$500 (or more) per hour. Additionally, there is usually an “administrative” cost charged by the organization under whose auspices the arbitration is being conducted (*e.g.*, the American Arbitration Association or JAMS/Endispute). The cost is further increased if the franchise agreement requires that three arbitrators participate. It is easy to see that even in a relatively straightforward dispute, the costs can be significant. Moreover, good arbitrators are usually in high demand and often are unable to block out extended periods of time for a multi-week arbitration. Thus, a case that would take three or four weeks to try in court may take many months to complete in the context of an arbitration. Inevitably, this leads to increased fees and costs as counsel will undoubtedly need to prepare before each session. Additionally, lawyers always seem to find more issues to explore if the time to do so is available.

- Mediation

Mediation is generally a voluntary process, although some franchise agreements and courts require that the parties engage in mediation or some other similar form of dispute resolution (*e.g.*, the so-called “early neutral evaluation” process required by some federal district courts). Mediation, of course, also costs money. Nonetheless, it is usually money well spent. Although it may not always appear to be the case, the overwhelming majority of lawsuits settle. With this in mind, both the client and outside counsel should constantly be reevaluating the case from the point of effecting a potential settlement. Of course, it “takes two to tango,” and sometimes the other side (or lawyer) has little apparent interest in discussing settlement despite

all reasonable overtures. A skilled mediator (generally a former judge whose experience provides credibility to his suggestions) is often able to bring about a settlement in a dispute that appears to all others incapable of being resolved short of an arbitration or trial. Moreover, given that it is a voluntary process, neither party is required to do anything that they do not want to. In sum, there is nothing to lose and possibly something to be gained.

When should a mediation take place? Although settlement can, and generally should, be considered or discussed as soon as a lawsuit is filed, a successful mediation usually requires that basic discovery have been completed so that the parties will have had an opportunity to develop their factual and legal theories. In the absence of this, one or both of the parties are either not really ready to settle, and/or the mediator does not have enough "ammunition" to effectively convince the parties that a negotiated settlement is better than the expense and uncertainties of continued litigation. Given this reality, the litigation expenses can be significant by the time a mediation takes place. Despite this and the inevitable "digging in the heels" mentality that follows, mediation provides the best forum for effecting a potentially creative settlement and ending the litigation expense.

Out-of-Control Litigation (Sometimes the Best Laid Plans Go Awry)

It is every client's nightmare -- a seemingly straightforward dispute that, under normal circumstances should be resolved relatively quickly, turns into a sprawling, multi-faceted, expensive, and time-consuming lawsuit. Unfortunately, it happens. Why? Could it have been prevented? The answer, of course, depends on the circumstances. However, an out-of-control case is often caused by a combination of (i) particularly bad facts; (ii) an angry or unrealistic opposing party; and/or (iii) an unreasonable opposing counsel. Generally speaking, these variables cannot be controlled, although the consequences of these types of problems can sometimes be minimized or managed.

Assuming that the potential problem is truly a surprise and could not have been discovered through some reasonable initial investigation, the most that outside counsel can often do is identify the potential problem as soon as possible and discuss the alternatives with the client. While this does not necessarily make the problem go away, it does have the salutary benefit of alerting the client to what lies ahead.

Conclusion

Litigation is an inevitable by-product of business, and is particularly predictable in the franchise context where there is inherent tension between the franchisor and franchisee. From the client's perspective, litigation is never a good thing and almost always costs too much. A proactive approach to litigation management can, however, go a long way towards controlling the costs and increasing the likelihood of obtaining a favorable result.