

# Litigation Hot Spots

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## LITIGATION

- an event or proceeding which has a strategic, economic or reputational risk.
- Effective management of risks requiring early identification.

## Core Documents

- Do your key contractual documents have arbitration, governing law, jurisdiction, limitation of liability and termination provisions that work?
- A good arbitration provision can insulate you from class actions, prevent publicity, preserve confidentiality of oral and documentary evidence, control pre-trial and trial procedure, ensure a trier of fact that is experienced, reliable and familiar with your industry and prevent getting "home towned" far from your witnesses, documents and counsel that know your business.
- Who do you want interpreting your key documents? A Texas jury or an experienced commercial lawyer or retired judge who you have selected?
- Is the arbitration provision tailored to the contract or is it a cut and paste job by a sales team closing a deal?
- Does it seat arbitration in a foreign city, far from your witnesses and documents, with multiple arbitrators which will triple costs and scheduling difficulties?
- Is there a termination provision that makes sense? Has it kept up with the practicalities of the business? Is it too short to allow a replacement of the goods or services? Is it too long to provide needed flexibility?
- Are your limitation of liability provisions solid? Are they confined to death or bodily injury? Do they appropriately limit or allow indirect and consequential losses?
- Is there a meaningful confidentiality provision and entire agreement clause?

## Tenders

- Are your tender documents solid? Do they have exclusionary clauses?
- Are RFP's phased properly?
- Recent injunction decisions on irreparable harm mean lost profit are not the only remedy.

## Standard Engagement Letters

- Do they make it clear that they are not a binding agreement for the contract under discussion?
- Proper confidentiality provision.
- Entire agreement clause.

## Purchase Orders

- Do they address the battle of the forms?
- Do they have all of the provisions discussed above?

## Policies and Procedures

- records retention including electronically stored information (ESI).
- preparation of financial statements; continuous disclosure requirements under securities laws and ethical codes of conduct.
- compliance - bribery and corruption - COFPA

## Solicitor Client Privilege

- Does your client understand the scope of the privilege? Including corporate counsel in communications with people inside and outside the company, oral, written or electronic does not automatically make them privileged. In fact, doing so can destroy the privilege.

## E-Mail

- Email pitfalls - engineering/manufacturing/product development environments where the impulse to theorize about problems , their cause and solutions.
- Financial industry musings about prospectus contents, data room, fairness opinions.
- Have senior personnel been schooled in e-mail use in the context of high risk issues?
- Do you have a protocol to govern e mail in high risk situations?

McCarthy  
Tétrault