

Tips & Tactics for Avoiding a Game Over Managing Legal Disputes in a Pre-Litigation Environment

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Today's Agenda

- Introductions
- Best Practices for Your Business Affairs
- Contract Drafting Tips to Avoid Litigation
- Attorney-Client Privilege Considerations
- Alternate Dispute Resolution, Early Settlement Discussions, Insurance
- Litigation Holds and the Duty to Preserve Evidence
- Questions

Best Practices for Your Business Affairs

- Evidence Your Agreement in a Written Document
 - Binding/Not Binding
- Due Diligence of Other Parties
 - Social Media and/or other online presence
 - Run litigation search
 - Network references
- Standardize and Centralize Your Contracts
 - Update forms as needed
- Maintain Process for Executed Contracts
- Use Technology Where Appropriate
- Engage Counsel to Invoke Privilege



CONTRACT DRAFTING TIPS TO AVOID LITIGATION

■ Three Types:

- Transaction Specific Provisions
- Risk Shifting Provisions
- Litigation Avoidance/Dispute Resolution Provisions

■ Deal Specific Provisions:

- Parties
- Term
- Renewals
- Expiration/Termination
- Survival



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CONTRACT DRAFTING TIPS TO AVOID LITIGATION

■ Risk Shifting Provisions

- Indemnity and hold harmless provisions
- Exculpatory Provisions
- Insurance Provisions
- Claim Releases and Waivers
- Disclaimer Provisions
- Drafter Provisions
- Jury Waiver Provisions
- Jurisdiction and Venue Provisions
- Limitation on Liability
- Expenses and Prevailing Party Provisions



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CONTRACT DRAFTING TIPS TO AVOID LITIGATION

- **Litigation Avoidance/Dispute Resolutions Provisions**
 - Cure Provisions
 - Arbitration Provisions
 - Limited Remedy Provisions
 - Mandatory Mediation Provisions
 - Disclaimer Provisions
 - Use of Industry Appraisal/Valuation Standard Provisions



Attorney-Client Privilege in a Corporate Environment

As a dispute begins to brew, please remember the attorney-client privilege and when it does and does NOT apply!

Attorney-Client Privilege Applies to:

- Communications between a client and attorney
- Made in confidence
- For the purpose to obtain or provide **legal advice**
- Unless the protection is waived.

Corporations can be considered clients for purposes of the attorney-client privilege.

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Attorney-Client Privilege in a Corporate Environment

The Related Work Product Doctrine

- Work product doctrine =
 - Protects documents prepared *in anticipation of litigation* by or for a party, its representative or counsel
 - Meant to protect the mental impressions of legal counsel and prevent unfair advantage from the disclosure of such communications
 - Client or attorney can invoke work product

Attorney-Client Privilege in a Corporate Environment

The Dilemma for the In-House Lawyer

Because an in-house lawyer wears many hats (business advisor, legal advisor, etc.) and those distinctions are hard to draw because of an in-house lawyers day-to-day involvement in many aspects of the business, the application of the attorney-client privilege is questionable in many instances.

Is your communication really privileged? Or, will it be discoverable in litigation later on?

Attorney-Client Privilege in a Corporate Environment

Business v. Legal Advice

*Remember the attorney-client privilege only applies if you are providing **legal advice**.*

*The problem is that most of your communications as an in-house lawyer are **dual purpose communications** which encompass both **business and legal advice**!*

Attorney-Client Privilege in a Corporate Environment

Business v. Legal Advice

“Primary Purpose” or “Because of” Tests

Courts struggle to articulate the degree to which the legal purpose of the communication must dominate over the business purpose of the communication.

Legal advice must be the or a primary purpose of the communication
(Primary Purpose Test and Variation of Primary Purpose Test)

Was a dual purpose communication made “because of” the need to give or receive legal advice?
(Because of Test)

Alternate Dispute Resolution and Settlement Negotiations

- **Have you followed the dispute resolution mechanism in the contract?**
 - Is there a cure period?
 - Do you have to engage in good faith negotiations?
 - Have you sent the proper written notices to the correct addresses and people in the notice provision section?
- **Demand Letters**
 - Have you tried sending demand letters from different people to see if you get a favorable response?
 - Business leaders with the highest titles
 - In-House Counsel
 - Outside Counsel
 - Should you include a courtesy copy of a draft complaint?

Alternate Dispute Resolution and Settlement Negotiations

- ***Mediation Pre-Litigation***

- Some contracts require this but even if not required, it may be a good idea.
 - Consider exchanging informally documents and information that you would have to produce in discovery anyway if it might aid with settlement.
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- Do you need to file suit first because you want to be the plaintiff or preserve a specific jurisdiction?
 - If yes, you can still engage in some of these strategies to keep the litigation from progressing.
 - You can stay the case pending mediation.

Alternate Dispute Resolution and Settlement Negotiations

And on the flip side...

- **Do Not Ignore Demand Letters**
 - *Particularly response deadlines in those letters*
 - *Address them immediately. Engage outside counsel if needed.*
 - *Don't sit on those letters.*
- **Make sure you know who your resident agent is and be sure that you are getting timely information about new lawsuits**
 - *Consider registering with the Secretary of State in any State where you do business*
 - *Do not sit on any complaint has been served on you.*

Alternate Dispute Resolution and Settlement Negotiations

If you reach a settlement...

- Draft a comprehensive settlement agreement with adequate release language to ensure that the matter cannot be litigated.
- Consider confessed judgment/consent judgment provisions to avoid litigation in the event of a breach of the settlement agreement.
- Consider confidentiality and non-disparagement clauses to protect your reputation in the business.
- Consider all the other components of a good contract like jurisdiction, venue, choice of law, attorneys' fees for breach, etc.

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Insurance Considerations

- **Get Insurance!**
 - Comprehensive General Liability
 - Errors and Omissions
 - Employment Practices Liability
 - Specialized coverage for your industry.
- **Notify your insurance company as soon as possible of a potential claim.**

Litigation Hold Letters and Duty to Preserve Evidence

- **If you anticipate litigation, you have a duty to preserve evidence!**
 - The duty arises when you reasonably anticipate litigation or there is a credible threat of litigation.
 - The duty can arise before a lawsuit is even filed.
 - Send a litigation hold letter to the necessary persons within the company who might have discoverable information in the event of a lawsuit.
- **It's a two way street so don't forget to demand that the opposing party do the same.**
 - Document in writing your request for the opposing party to preserve evidence and to issue a litigation hold on their end as well.

Reminders and Other Tips

- Have contracts for everything. **Oral agreements are bad.** Know what is in your contracts and follow them! And, read them before signing!
- Revise and improve forms on an ongoing basis.
- Follow your own policies and procedures.
- Train your staff on your policies, practices and on what they can and cannot do.
- Foster a culture of honesty, integrity and transparency and open communication so you can learn about potential issues before they become a big problem.

Reminders and Other Tips

- Know your business partners and clients. Give thought to who you want to do business with.
 - Be nice. Keep clients, customers and business partners happy!
 - Keep “Naughty” List of Business Partners
- Keep excellent written records of everything. Paper conversations in emails memorializing the discussions.

Questions

