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Ruptured Relationships: Thinking Ahead to Trial so that You Won't Be on Trial

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The key to handling any business conflict is to visualize a winning trial strategy and work backwards.

Our Goals Today

- Spot risk factors that can make disputes more likely to go to trial
- Position your key executives and other witnesses for success
- Develop a record that will maximize your chances of success if litigation occurs

The Common Theme That Drives Cases to Trial

Most cases settle, but those that don't often have some important things in common:

- **The betrayal story** — a trusted relationship violated for bad reasons — is the most powerful theme in prosecuting a commercial lawsuit
- Risk is higher when your top people will be important witnesses and targets
- Risk increases when the so-called “betrayal” is highly profitable for you, damaging to your opponent, or both

Defending Against the Betrayal Story

- To defend against the betrayal story, you need to redefine the relationship, what it is and what it is not, and prove that your client has done right by the other side within the confines of that redefined relationship.
- The defense needs to reconcile all of the evidence, especially your opponent's best evidence.

Case Example (Defense Side): ReactX v. Google

- Betrayal story theme: Plaintiff claimed that Google stole its confidential business information, violating the terms of a trusted business partnership.
- How we countered that theme:
 - Redefine the relationship — it was nothing like a partnership.
 - Google did right by ReactX in the context of the redefined relationship.
 - Address problematic documents.

Case Example (Plaintiff Side): OpenNet Telecom Sales

■ Betrayal story theme:

- Our client had a contract with a much larger second company to sell products to a third company (a multi-national telecommunications company).
- Our client bore all the costs and risks of product development and was entirely dependent on the second company to sell them to the third company.
- Unbeknownst to our client, the second company was secretly developing its own products and competing against our client for sales to the third company.

■ We won a very large settlement without even filing a lawsuit based on the strength of the betrayal story.

Scenarios That Can Lead to Litigation and Trial

■ Interactions with other businesses and entrepreneurs should be carefully managed to mitigate litigation risk. Some examples:

- Meeting with a business under NDA to hear a pitch or consider an acquisition
- Working with a business to use its technology, but then designing your own version instead
- Joint development agreements
- Partnership agreements
- Hiring employees from a competitor

Trial Risks

- Provocative emails/chats
- Witnesses not prepared and/or knowledgeable at deposition
- Don't over-rely on the attorney-client privilege

Focus 1: Trade Secret Litigation Risks

- Trade secret cases are difficult and expensive.
- They are easily shaped into a classic “betrayal story” narrative.
- Trade secret cases often center on business contracts or on employees hired from a competitor.

Common Scenario in Trade Secret Cases: Developing Similar Technology

- Your company has signed an NDA with another business, and has licensed its technology.
- Your engineers have become familiar with the business partner's technology.
- The licensed technology is expensive and has problems.
- Your executive team would like to replicate their own, in-house version.
- The “betrayal story” narrative almost writes itself.

How to Reduce Risk When Developing Similar Technology

- Careful attention to independent development terms
- Careful attention to limitation of liability terms
- “Clean team” development with a favorable paper trail
- Keeping key executives out of the discussion and paper trail
- Candor with the business partner when terminating
- Document cleanup

***Case Example (Defense Side, Trade Secret Case):
GSI v. United Memories, Inc. & Integration Silicon Solution Inc.***

- Betrayal story theme: Defendant hired Plaintiff's former contractor to allegedly steal trade secrets to win a competitive bid.
- How we countered that theme:
 - Redefine the relationship — Defendant did not hire the contract designer based on its previous work with the Plaintiff.
 - Show good faith conduct — when Defendant learned of Plaintiff's concerns, Defendant offered to replace any potentially offending technology from its design.

Focus 2: Contract Litigation Risks

■ Things to consider:

- Your company's right to work independently notwithstanding any collaboration
- Careful definition of what the collaboration is and is not (your company's right to compete, develop its own independent technology, engage in similar relationships with others, etc.)
- Clear ownership of intellectual property and other rights
- The end game: the term of the collaboration; circumstances in which the collaboration can be terminated earlier for cause or any reason; obligations after the collaboration is over (clean up of information must be practical and easy to follow)

Case Example (Plaintiff Side, Contract Case): Blue Ocean

Two Key Takeaways

1. A cautionary tale about venue selection provisions
2. A jury cannot be waived pre-dispute in California

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QUESTIONS?



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