



Litigation Avoidance Strategies How to Reduce Legal Costs by Expanding Your Legal Team



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January 9, 2013



Why Avoid Litigation?

- **Cost:** A business should consider not only attorneys' fees, but also other associated litigation costs, such as electronic discovery, vendors, experts, court costs, etc.
- **Risk:** Litigation is inherently uncertain. Even if you believe that you have a "slam dunk" case, there is always inherent uncertainty in litigation.
- **Time:** Unfortunately, the least expensive aspect of being involved in a lawsuit is usually legal fees. The real expense is usually the time required by you and your employees, time which will be taken away from productive use and instead expended in litigation effort.
- **Delay:** Litigation itself can be drawn out and even if you obtain a favorable ruling at the trial court level, that ruling is subject to a lengthy appellate process. Ultimately, sometimes, obtaining resolution can take many years.
- **Effect Of Litigation On Other Issues:** Depending on your line of business, litigation can affect your reputation and future business with your adversary and others.





Litigation Avoidance Strategies: Get Real with your Clients

- **Ask the Hard Questions of Your Clients Upfront:**
 - Who?
 - What?
 - Where?
 - When?
 - How?
 - Why?
- **Advise Your Clients to Do the Following:**
 - **Use Common Sense:** Exercising some common sense at the beginning of a business relationship can solve problems later down the road. For example, smart business owners may perform credit checks on new customers. Business partners can often be liable of each other's debts, so it can make sense to consider avoiding business partners about which you know little. A business should look up a potential business partner's litigation history before performing a joint venture.



Litigation Avoidance Strategies: Get Real with your Clients (Cont'd)

- **Make Sure You Can Prove It:** Documentation is often the key to avoiding litigation. Even though oral contracts are enforceable, in practice, without a way to prove what was orally agreed upon, there can be no mechanism for enforcing your rights under a contract, or doing so can be very costly and uncertain. Documentation can avoid disputes.
- **Use Precise Words:** Judges take words very literally. A business person may feel awkward being blunt with clients, employees, or vendors, but clear language at the start of a business relationship can prevent headaches later. For instance, an employee told he or she is being terminated because "things are not working out" may infer a sinister reason for termination, even when none exists.
- **Teach Your Employees To Care About Your Business:** It does a company little good to have an owner following every letter of the law if its employees do not know or do not care enough to do so. Satisfied employees who have an interest in their company's future work to keep customers happy and avoid disputes. Disgruntled employees are a source of liability for any company.





Litigation Avoidance Strategies: Get Real with your Clients (Cont'd)

- **Learn To Doubt:** Many disputes can be avoided if business people develop a more realistic sense of reading people and the promises they make. Just because a person learns to use precise language does not mean that other people will do the same. Often, being asked to commit to a promise in writing is enough to make the other side back away from the original overstatements. For instance, a vendor may make an unrealistic “guesstimate” of how soon he or she can deliver a product or finish the job, but a little probing may show that he or she is unlikely to be able to deliver the promise. If someone cannot guarantee an estimate, it may be best to do business with a person who makes a more realistic estimate and can stand by it.
- **Be Careful What You Promise:** Do not make promises that you cannot keep. The world is full of uncertainty and no one can be positive that he or she can fulfill his end of a promise. When the unexpected happens, for instance, a key employee leaves, the computer system goes down, etc., and a company is unable to deliver what is promised, is there a way out? When a company promises to provide a service by a given date and does not leave itself a way out, it effectively is assuming responsibility for unanticipated occurrences. A quick review by business counsel prior to executing contracts can help a business determine whether it is assuming more risk than it is aware of.



Trial Lawyers and Business Lawyers Working Together to Avoid Litigation

- **Just Because You Can Do It Doesn't Mean You Should Do It:** While a business lawyer may be able to parse the language of an agreement to justify the most aggressive position, it doesn't mean that a judge or jury will agree. Even though a client can justify everything you did, a judge and jury might view it as overreaching. Trying cases teach you that judges and juries rarely view things in the black and white way that litigants do. Sometimes taking a less aggressive position will save time, money, and grief. Thinking “what will this look like a year down the road in front of a judge or jury” can be key and a litigator can help you do this.
- **A Trial Lawyer's Experience May Reveal Unforeseen Consequences:** One of the benefits of trying cases is that trial lawyers get to see how contract provisions actually work. Provisions that seem favorable or innocuous at the time may not turn out to be so in reality. Examples: arbitration, mediation, indemnification, contribution, covenants not to compete, IP property licensing issues.





Trial Lawyers and Business Lawyers Working Together to Avoid Litigation (Cont'd)

- **Sometimes You Can Change The Rules:** Within limits, businesses can negotiate the parameters of any future fight over their relationship. Trial lawyers can help you figure out ahead of time which elements of a future dispute should be modified by agreement in a way that helps you in the end. For example, statute of limitations issues, choice of law, venue, or determining whether to waive a right to a jury trial. Contemplating these issues before the final agreement is reached, with the input of an experienced litigator, can lead to better choices.
- **Put Your Emotions Aside:** Good relations with clients and others are important to create and preserve. A good attorney can offer suggestions on how preventive legal practices can be implemented without “killing the deal.”



Takeaway Points

- **Put the Best Team in Place Up Front**
- **Don't Reinvent the Wheel if you Don't Need To, but Reinvent the Wheel When Necessary:** While it is often tempting to use old forms, there are certain items that you need to make sure are up to date, including legal issues in specific jurisdictions and making sure that any documentation of a deal is accurate and reflects the nuances of the situation.
- **“An Ounce of Prevention is Worth a Pound of Cure” – Benjamin Franklin**