10 Practical Tips to Avoid Litigation in Unprecedented Times

The COVID-19 pandemic has every general counsel thinking about and confronting a host of legal issues (employment, force majeure clauses, insurance, etc.). And this is happening in a rapidly evolving environment with little visibility into what, at least, the next coming weeks and months might hold. If there was ever a time to reduce legal spend on disputes, this is it, and we say that as a boutique law firm dedicated exclusively to litigation. We recognize that litigation should almost always be the option of last resort, even in the best of times.

As you navigate the tumultuous waters over the coming weeks and months, we want to offer practical tips to help you avoid the high costs of litigation. These tips are based on our experience of counseling clients on ways to resolve disputes quickly and successfully before litigation starts. We have seen every permutation of dispute, from the plaintiff and defendant’s perspective. Based on that experience, we recommend a consideration of the following:

1. **Do Not Ignore a Complaint or Dispute.** What seems like a small thing can quickly spin out of control, especially in these unprecedented times, so tackle problems before they escalate. As businesses deal with a host of internal and external changes and pressures, it may be necessary to prioritize the most immediate and pressing issues and set up a triage system. That makes it easier than ever to lose track of other issues or disputes. While most people understand that additional time may be needed to address a complaint or dispute at this time, it is important to communicate the reasons for any delays. When someone sees that you want to help them resolve a complaint or dispute promptly, they will be impressed with your attention to detail and more easily trust you to solve their problem for them.

2. **Tolling Agreement.** To avoid unnecessary and expensive litigation, it may be particularly useful at this time of crisis for parties to enter into tolling agreements. Under a tolling agreement, the parties agree to “toll” the running of the statute of limitations on certain claims for an agreed-upon period of time such that a party cannot later argue that a claim is time-barred due to the passing of time during the tolled period. Given the pandemic, many businesses today may be unable to manage all their litigation risks and potential legal disputes on the same time-line as they would have done in the past. Rather than being forced into litigation due to a statute of limitations deadline, it may be beneficial to
enter into tolling agreements. A tolling agreement can provide the breathing room needed for the parties to conduct negotiations to settle a dispute.

3. **Turn Your Adversary into Your Ally.** Know your adversary’s position. If possible, before litigation arises, have your potential adversary explain their position preferably in writing for clarity and to erase any doubt. As litigators, we often find that the parties do not understand each other’s motives or reasoning when litigation begins. Due to the adversarial nature of litigation and the high value placed on the element of “surprise,” it can be difficult to obtain important information about the other party’s position before the parties find themselves entrenched in their positions. Before litigation arises, keep communication with the other party open. Put yourself in the other party’s shoes. There are often good reasons the other party is frustrated. If you can work out what the other party’s motivation or frustration is, you are halfway to resolution without litigation. Even if you are unable to resolve the dispute, you will be armed with important information that will likely strengthen your case.

4. **Keep People in the Loop.** There is a lot of uncertainty and changes due to the rapidly evolving situation with COVID-19. It is more important than ever to provide your stakeholders (e.g., clients, customers, employees) with updates and information so that they know what is happening. If your website goes down, for example, provide an accurate update as soon as practicable. Additionally, even where information appears to be obvious, it is important to notify your stakeholders with basic information about the status of your business operations and what steps you are taking to address issues of importance to them in light of the COVID-19 pandemic. These simple courtesies go a long way. If you were in the same position you would want to know.

5. **Get Contract Changes Documented Properly.** If you are restructuring a contract, make sure you properly document the changes preferably in writing and not in an email string, even if you have had prior harmonious dealings with the other side. We often see email “amendments” leading to a host of problems. They often lack context or have significant ambiguities. As businesses experience operational difficulties and possibly even downsize, it becomes even more likely that contract disputes will arise and that oral or hastily drafted amendments will be lost, forgotten, or misunderstood.

6. **Facts First.** Understand the complaint and dispute by objectively gathering all of the facts at the earliest possible time and gathering all available documentation to support the facts. Trust but verify what the business people are telling you about the complaint or dispute. Often other facts emerge in litigation that you wish you had known sooner. After
you get all the facts, you can then carefully determine your position. This determination should include not only the question of what you may be entitled to but also why and how much. Be objective and do not get emotional about the dispute. It is a business problem and usually involves only dollars. Do not make it a moral issue or you will lose objectivity.

7. **Independent Set of Eyes.** If confronted with a contract dispute, ask someone other than the drafter to review it and give an assessment. While the person who drafted the contract (whether that person is an employee or served as outside transactional counsel) may have important first-hand information about the intent of the parties and should be consulted, people who drafted the contract often have a bias to construe the contract in the manner that they subjectively understood it or in an otherwise favorable manner. A fresh set of eyes often can provide a more objective assessment of the contract language—just as a judge or jury would.

8. **An Ounce of Preventive Research.** Especially in light of the financial difficulties and uncertainties created by the COVID-19 pandemic, it is more important than ever to be thoughtful and deliberate when entering into new contracts or business relationships. There may be a tendency at this time to do whatever is necessary to get business into the door, but that can lead to problems down the road. Make sure you understand the intentions of your clients or business partners and properly gauge their ability to perform on a deal or contract. If a contract or order seems to good to be true, it probably is. If you do not know your business partners well, the first step is usually to ask around in the business community about the reputation of the other party. You may learn they are experiencing financial problems or often embroiled in disputes. Some people are just litigious and difficult to work with. Additionally, a background check, internet research, and at a minimum a simple Secretary of State search to ensure the business is active will drastically help to limit risks on the deal.

9. **Proper Entity Selection.** Take advantage of available corporate structures to ensure you are using the best legal structure for your business, which can save you money on taxes and shield owners and officers from personal liability. It also may also be appropriate to create multiple entities within the corporate family to provide additional protection both for the parent company and its shareholders or members. Although relying on services like Legal Zoom to effectuate entity changes may seem cost effective, contacting a lawyer to provide advise on these matters can save huge amounts of both tax and litigation money down the road.
10. Document Damages. A case supported with concrete evidence of damages is much more likely to have a positive outcome. Often, parties commence litigation hoping to discover the extent of the damage through the discovery process. While that may be appropriate for certain situations, a litigant is always better suited if specific damages are established by credible evidence. For the same reasons, a resolution short of litigation is much more likely where a demand can be made based on a credible damages theory supported by the factual record. While many will rely on the presumption of damages due to the severe disruptions caused by COVID-19, reliance on any presumption is unlikely to deliver a business resolution outside of court.

We hope you, your loved ones, and colleagues are staying safe and doing well.

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