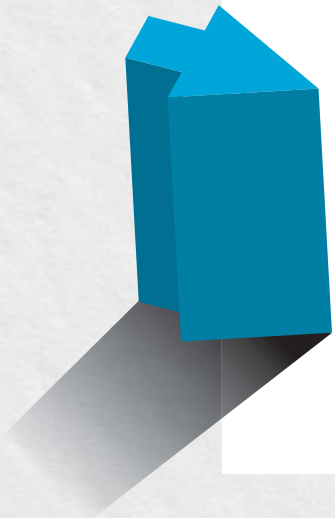
TEN STEPS TO KEEP YOUR CLIENTS OUT OF COURT



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Organizations that have hired in-house counsel have made an important first step in mitigating risk in their business. They have entrusted this individual to manage legal matters such as contracts and claims. As we all know, our role involves so much more. We mitigate risk for our clients through our understanding of our clients' business and our development of relationships with our fellow employees and business leaders.

No matter what your legal budget or the limits of insurance your client carries, there are many steps you and your organization can take to establish a reasonable level of risk in your client's business. There is no way to eliminate all risk, and there is a certain degree of healthy risk that our clients should take in order to realize their business goals. This article is intended to inform readers of steps they can take to help their clients reach a balanced level of risk in their business, safeguard their clients' assets and reputation, and do so at a reasonable cost.

The surest way to avoid litigation is to avoid disputes. But inevitably some disputes will occur, so you can limit the scope of problems with planning and focus at the start of every transaction or project.

At the outset, in-house counsel can ensure that contracts or other documents governing the transaction or project are as clear as possible. Many lawsuits have developed over unclear or ambiguous contracts and documents. Specifically and unambiguously defining each party's rights and obligations at the start greatly reduces the risk of disputes.

The hallmark of a well-drafted document is that it is easily understood by both parties. Many years of experience trying complex contract cases have demonstrated that parties often find themselves in court because they did not take the time to study and fully understand the contracts before signing them. When all parties know what is expected of them and what they are entitled to, disputes are far less likely to arise, and those that do can be quickly resolved.

Preventive measures

In-house counsel should consider keeping a library of form contracts that are appropriate for the types of transactions in which the company regularly participates. Updates and modifications to form contracts should be made regularly and considered whenever a dispute arises. When you have a dispute, learn from it. Think about whether the dispute could have been avoided or de-escalated if the contract had been drafted differently, and adjust your forms accordingly before your next transaction. Forms should also be updated whenever there is a significant change in the law. It is important to schedule periodic reviews of all forms to see that they are current.

In addition to drafting clear and concise contracts, certain types of standard terms can be used to avoid litigation by encouraging resolution of disputes. Dispute resolution procedures should be specifically required by contract, including mandatory pre-litigation procedures. A contract's dispute resolution procedures should require mandatory management negotiation before mediation, and mandatory mediation prior to litigation.

Requiring serious negotiation by top-level decision-makers at your organization before starting litigation should decrease the likelihood that a dispute will end up in litigation. If a dispute does arise, it is essential that the right person with decision-making authority participates in negotiations and is properly prepared, informed, and authorized to engage in good faith, productive negotiations. If negotiations fall short, mandatory participation in a serious and well-structured mediation prior to litigation will also improve your odds of resolving disputes without the need to head to the courthouse.

Mitigating risk

Litigation often can be discouraged by contractual provisions that predetermine the scope of liability or shift the risk of pursuing litigation, such as requiring one party to pay the others' fees and costs. Cure provisions, indemnity and hold harmless provisions, exculpatory provisions, liquidated damages provisions, and provisions that either waive or limit a party's liability for certain types of damages (i.e., a consequential damage waiver) or for certain actions (i.e., a waiver of liability for negligent acts) or limitation of liability provisions can all serve to limit or eliminate a party's liability. By clearly defining the potential liability that a party may have for a breach, or even a specific type of breach, you can increase your chances of resolving a dispute without the need for litigation. When using these types of contract terms, evaluate what rights or potential avenues of recovery your company may be giving up and weigh those against the time and cost savings that are likely to result from avoiding potential litigation.

Insurance requirements can help avoid litigation in the right

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circumstances. Always consider and anticipate the type of losses or liabilities that may arise if something goes wrong, and protect against those risks with appropriate insurance. If sufficient insurance is available when a loss occurs, it can reduce the need to litigate disputes or, at a minimum, limit your exposure for litigation costs or damages. Smaller organizations that decide to self-insure or assume uncovered risks should consider implementing contractual protections such as broad indemnifications, limitations of liability, disclaimers of warranties, and waivers of consequential damages. Depending on the industry, internal controls and training on avoiding litigation can also help mitigate risk for small uninsured firms. In litigation, the stakes can be greater for a small organization without coverage, but it is also not uncommon for a plaintiff to focus liability on the most heavily insured defendants in a lawsuit.

Having a risk management program in place promoting early detection and resolution of a potential legal problem is also critical to avoiding litigation. Employees should know that nothing is gained by sweeping issues under the rug or going it alone. They should be trained to identify early warning signs. In the context of a construction project, early warning signs may include a client's refusal to pay an invoice, misaligned expectations regarding the scope of work, or communication breakdowns among the project team.

Still, despite the best efforts of in-house counsel, some problems are unavoidable. When a dispute is on the horizon, consider these 10 steps to avoid litigation.

1. Know the facts before going to battle

Carefully determine your company's position based on the facts and evidence. You are more likely to get a fair result when you have knowledge of the facts and a reasonable understanding of your company's potential exposure.

Whenever a dispute arises, a critical step to reaching a resolution is to assemble the appropriate team to gather the facts and objectively evaluate them. In-house counsel's proximity to the organization and its business, people, and processes is instrumental when investigating facts surrounding a potential legal issue.

After an employee reports a potential legal problem and in-house counsel determines that further investigation is warranted, in-house should take some additional steps. First, they counsel should identify who can provide additional history, context, and facts surrounding the issue and then interview them. Second, in-house counsel should locate and collect relevant documentation and any information concerning verbal communications about the issue.

Remember that with all business deals, the people who are most intimately involved will have the most relevant information and will be essential when finding a solution. However, these same people could also be too close to have the necessary level of objectivity to evaluate a problem. It is therefore critical that decision-makers remain objective and unpersuaded by emotions and expectations. Of course, it is not always easy to encourage objectivity when working with impassioned colleagues; however, as the lawyer, it is your responsibility to give the best legal advice that you can to your client. Therefore, difficult conversations like this will need to be had. In the event of a particularly awkward situation involving a colleague who is your superior, reliance on outside counsel for this type of communication may be advisable.

2. Promote open communication, but establish protocols

In-house counsel who have established themselves as trusted advisers within their organizations play a vital role in mitigating risk and avoiding litigation.

Depending on the industry, internal controls and training on avoiding litigation can also help mitigate risk for small uninsured firms. In litigation, the stakes can be greater for a small organization without coverage, but it is also not uncommon for a plaintiff to focus liability on the most heavily insured defendants in a lawsuit.

Being accessible to employees at all levels of the organization promotes disclosure and transparency. Make sure you are the first person an employee thinks to notify when they encounter a potential legal problem. It will ensure confidentiality and can protect the attorney-client privilege. Early communication by employees also can help in-house counsel ensure timely reporting to applicable insurance carriers so that coverage is not compromised.

It is also imperative that you always keep the lines of communication open — this includes lines of communication between you and your expert advisers and between you and the other party. If your company wants to find a resolution without a lawsuit, never shut down negotiations altogether, even when they seem to stall or be unsuccessful.

In-house counsel should not overlook the importance of preserving confidentiality and privileged communications on behalf of their clients. One key way to do this is to establish a communication protocol among employees involved in the issue. Counsel should inform employees to refrain from emailing about the issue unless it is a communication to counsel or the counsel is copied. As attorneys, we are all familiar with the vulnerability of the attorney-client privilege in the in-house context as established by the *Upjohn* case. Communications from or addressed to in-house counsel may not necessarily be limited to the rendering or requesting of legal advice. As such, in-house counsel may want to insist that employees also copy outside counsel on any email communications concerning the issue since the privilege is less likely to have holes poked in it by an adverse party wanting to make evidence discoverable that was otherwise assumed by the generating party to be privileged.

The same applies to verbal communications. Counsel should instruct employees to involve counsel during such discussions. Doing so will avoid having to disclose the details of the conversation if they are ever deposed.

3. Conduct an independent review

Whether in anticipation of litigation, or in its throes, conducting an independent review can be highly beneficial. If set up properly, the existence and results of such a review are not discoverable. Such a review can inform counsel about complex technical issues, influence strategy, reveal the organization's potential exposure, and promote early resolution. Those performing the review can be outside subject matter experts, those internal to the organization, or a combination. In the construction context, assembling an internal review team independent of the project can promote candor and buy-in by members of the original project team.

Performing an internal review comes at a cost. The time and effort expended by internal subject matter experts is an overhead cost and not billable to a client, as is direct billable project work. However, the knowledge gained from such a review can significantly reduce overall exposure in the long run or provide a reasonable picture of what exposure may look like at trial or in settlement discussions. Such information is valuable to a CFO trying to forecast losses on the balance sheet.

4. Consult experts early

In addition to gathering facts from individuals involved in the transaction or project that is in dispute, you must have a handle on the factual and legal issues relevant to the dispute as early as possible. This may require that you engage appropriate subject matter experts to provide you with an objective evaluation of the facts and any technical issues involved in the dispute. Objectively evaluating the facts with the help of an outside subject matter expert can help you further work out a solution with the other side.

Insurers promote early reporting because doing so can provide options for resolving legal issues before they turn into actual claims that the insurer must pay. As a means of preventing a problem from turning into a bigger one, some insurance carriers have loss prevention services and will pay up to a certain dollar amount for outside legal services and related expenses. In-house counsel can benefit greatly from such an arrangement. Keeping the insurance carrier apprised can avoid surprises or coverage disputes down the road.

In-house counsel should consider consulting with outside counsel at an early stage to understand the legal issues involved in the dispute and your organization's legal rights, obligations, and options. While it is not always necessary (and sometimes is not even advisable) to involve outside counsel in early discussions with your adversary, it can be helpful to have a "behind the scenes" evaluation of the legal issues and support from outside counsel before proceeding too far into negotiations. Such a relationship with outside counsel can also better preserve the attorney-client privilege.

In-house counsel who otherwise may work independently may need to work together as part of a legal team. Developing a strategy becomes a team effort informed by a variety of perspectives and experiences.

5. Strategize and constantly re-evaluate

Dispute resolution is like a game of chess. To be successful, you must see the entire board, anticipate your adversary's approach, and plan your moves. As soon as a dispute arises, conduct a big-picture evaluation of your issues and develop a strategy to get from beginning to end. Then constantly re-evaluate and adjust your strategy as you move forward and learn new facts while maintaining a consistent path in general. Finally, try to anticipate where your adversary is going and adjust your strategy accordingly.

Before pulling the trigger and resorting to litigation, decision makers should know about the realities of committing to litigation and carefully consider whether litigation is going to be an effective approach to the pending dispute.

Maintaining a consistent theme and message from the outset of a dispute is often a critical advantage in any dispute, and early strategizing will help you further develop that theme and message. Staying ahead of your adversary so that you don't spend all your time playing defense helps you steer the dispute in the direction that best amplifies your chosen themes and messages. All of these efforts maximize your chances of resolving the dispute without litigation.

6. Say what you mean; do what you say

To successfully navigate a dispute and avoid litigation, you must maintain credibility and avoid needlessly inflaming passionate reactions. A key rule of thumb is to say what you mean and do what you say. Never tell an adversary that you are prepared to go to court unless you have carefully considered all options and are in fact ready, willing, and able to go to court. Empty threats and exaggerated rhetoric are unlikely to achieve the desired result.

You also want to avoid exaggerating your claims, diminishing your company's potential liability or being unnecessarily dogmatic or dramatic in negotiations and discussions. If your actions are exaggerated or bombastic, your opponent's reaction will be too, and your discussions will become unproductive. Worse yet, your opponent may call your bluff, and you may find yourself in court before you are ready. None of this conduct will help you avoid litigation or otherwise encourage a successful resolution of the dispute.

7. Always mediate before litigating

Mediation is sometimes referred to as "marriage counseling for business people" and when done properly is an incredibly effective tool in avoiding litigation. In mediation, the parties engage a neutral third party to facilitate negotiations and encourage a settlement on mutually acceptable terms. Mediations are flexible, informal, and non-binding. There are no rules, rulings, or decisions in mediation, and there is no obligation to agree to anything.

Additional reasons that mediation is a preferable alternative to litigation:

- Parties retain control over the outcome, as opposed to litigation where the risk of an adverse outcome cannot be eliminated.
- Mediation, even in complex cases, is generally conducted in a day or two and therefore requires relatively minimal investment of time and money.
- Mediation is confidential and inadmissible in subsequent litigation, thus parties may have little to lose by mediating disputes.
- Mediation may preserve ongoing business relationships.
- For mediation to have the greatest chance of success, the parties should agree in advance to engage an experienced mediator with a track record of success and expertise in the subject matter of the dispute.

Not every mediator is equally invested in learning the facts about a dispute before attending mediation. Nevertheless, you should invest some time before mediation in educating the mediator about the project, dispute, and your claims or defenses. Mediators generally have their own style and preferred practices. Absent specific guidance from the mediator, you should plan to provide the mediator with key documents necessary to understand the issues as well as a summary of your claims or defenses and positions. A prepared and knowledgeable mediator will have a much better chance of success when resolving the dispute when they are prepared with such information. Realize that they are going to permit the other side the same time or page limit for it to present its position prior to mediation.

At the mediation, you can further increase your chances of success by following these guidelines:

- Insist that decision makers and insurance representatives for all parties are physically present.
- Prepare and make an advocacy-based presentation of your claims and arguments for all parties at the outset; a PowerPoint presentation including excerpts of key documents or other pieces of evidence can be a powerful tool when presented in a persuasive manner.
- Have technical experts to the extent necessary to explain technical aspects of the dispute.
- Remain patient and committed to the task — mediations take time to gain momentum, and often real progress does not begin until after 5 p.m.

8. Be realistic about what litigation means

Litigation requires the commitment of significant resources. Legal fees and litigation costs, including e-discovery (one of the most expensive and time-consuming aspects of litigation) and expert witness fees can be exorbitant. Litigation requires a significant commitment of time and resources of executives and employees and can keep them from their normal revenue-generating duties for the company. Especially in complex disputes, litigation can take years to complete.

Before pulling the trigger and resorting to litigation, decision makers should know about the realities of committing to litigation and carefully consider whether litigation is going to be an effective approach to the pending dispute.

Be realistic of just how big of a commitment your company will be undertaking, and weigh that commitment against the scope of the dispute and the projected or anticipated range of outcomes.

9. Know when to fold

In addition to its financial toll, litigation can be a significant drain on an organization's productivity, morale, and reputation. An overinflated sense of pride can never avoid or reduce liability. In some cases, trying to prove the other side wrong can be a losing proposition. Settling a case is a major decision requiring an organization's weighing of several factors. However, it should not be overlooked as an option. Under certain circumstances, settling a case can be the best decision in-house counsel can help an organization make.

Organizations should never lose sight that doing the right thing can go a long way. If, as a result of an investigation or independent review, it is determined that the organization is at fault, violated the law, or made a mistake that resulted in damage or injury to another party, the organization should not hide. With guidance from counsel and consensus among stakeholders, an organization should seek to engage in a dialogue with a potential or actual claimant. Such a dialogue can remedy a situation before it turns into a lawsuit or reduce the severity of potential damages and legal costs.

10. Implement lessons learned

After an organization has settled or been dismissed from a lawsuit, it is important for in-house counsel to consider lessons learned from the experience. Such lessons can be in-house counsel's management of outside counsel or the thoroughness of the investigation, interviews, or review of documentation. There also can be lessons learned by the organization including matters of compliance, quality, risk assessment, and decision-making.

Problem solving and crisis management are some of in-house counsel's most important responsibilities. Although never welcome, each crisis or situation that threatens liability to an organization presents an opportunity from which to learn. Before moving onto one of the other multiple responsibilities of their role, in-house counsel should take stock in what was gained from an otherwise negative experience and make it positive by refining processes necessary to defend against potential litigation and improving approaches toward resolution. **ACC**

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