



From Boardroom to Courtroom: Your Contract in Litigation

**You Negotiated and Executed a Contract
and Now that Contract is in Litigation,
What Does that Mean for Your Company?**

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Introduction

Pre-litigation Considerations

During the Deal

- Outside counsel retention
 - Deal lawyer and fact witness: Practical and ethical considerations.
- Anticipating the issues most likely to result in litigation
- Redlines of the Contract: Parole evidence and powerful evidence of who “lost” on an issue



Pre-litigation Considerations

During the Deal

- Developing your record for a better story
- Proof it to look for long run on clauses
- Pay attention to the dispute clauses- one way fee clauses, do you want a jury deciding these issues (esp. if you lost on a term in negotiations), and where do you want to potentially fight it out (think about who your client is, what law is better, and what type of forum will benefit you).
- Use AI programs available on the market to find blind spots



Pre-litigation Considerations for Potential Plaintiffs and Defendants

- Post Deal: Clear-eyed evaluation of the claim
 - Ambiguous terms
 - “Fixing” them now or later
 - Plain English vs. what you thought everyone knew it meant!
 - Who drafted the term- presumptions
 - Lining up evidence
 - Key witnesses (including corporate representative)
 - Parole evidence vs. post contract performance
 - Targeted email review
 - Fee shifting: Net recovery / risk of paying two firms

Pre-litigation Considerations for Potential Plaintiffs and Defendants

Client support:
witnesses, discovery,
costs, other business
priorities, and
defining success

Legal support: the
“challenger” model

Arbitration

Legal Hold/Privilege

- Document preservation – Deletion of known relevant documents

ABA Model Rules of Professional Conduct 3.4

“A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act”

- Consider reviewing retention, auto deletion policies
- Copying counsel on documents does not make it privilege



Litigation Hold – Case Considerations

General Rules

- Attorney has duty to:
 - educate on collection and preservation,
 - issue a litigation hold
 - oversee compliance during the compliance-
 - suspend routine document retention/destruction policy and implement a litigation hold to ensure the preservation of relevant documents as soon as litigation is foreseeable
 - Meet IT and find back up tapes, servers, drives and stop destruction
 - Preserve during the dispute- tricky as employees discuss litigation – watch and upkeep your privilege log

Litigation Hold

- What are they?
- Why do you have to do it?
 - Gross neglect if you don't
 - Presumption of bad faith
 - Oral does not suffice
 - Don't get your client/company sanctioned even if the case is small
- Preparation of them (Who writes it? Who is covered?)
 - What do you need to keep?
 - Timing of issuing the litigation hold



Litigation Hold

- In-house counsel's perspective
 - “Form” hold notices
 - Update the hold when new employees come on board
 - Discovery management team
 - Systemic confirmation of hold notice
 - “Form” questionnaires
 - Documenting rationale for the hold
 - Preserve by collecting
 - International considerations

Litigation Hold

- Outside counsel's perspective
 - How involved should your outside counsel be?
 - Better for company or third party to help preserve documents
 - Are you better off tossing documents when a contract is signed and before litigation arises? (or is it malpractice!)
 - What if company forgets something after issue the hold?
 - How doing a litigation hold wrong can burn you?

Litigation Hold – Case Considerations

General Rules

- Courts vary on level of bad faith necessary to justify a sanction for spoliation but look to the following:
 - (1) whether evidence was destroyed or lost when the party had a duty to preserve it;
 - (2) whether the party is culpable for such destruction; and
 - (3) the relevance of the lost evidence.

Litigation Hold – Case Considerations

General Rules

- Litigation hold generally not discoverable especially when party can show privilege, but certain elements can be inquired about
- If you don't preserve, courts can sanction and require turning over of the hold

Litigation Hold – Holds Gone Wrong

Illinois Cases

***Schmalz case* (N.D. 2018)**

Litigation hold includes text messages; parties can present evidence of spoliation

***Bankdirect Capital case* (N.D. 2018)**

Failure to issue proper litigation hold while not dispositive is a significant factor for spoliation

Litigation Hold – Holds Gone Wrong

Illinois Cases

In re Prods. Liab. Litig. **(S.D. 2013)**

Discovery failures stem from narrow implementation of the hold to only some sales reps. and not stopping autodeletion

Olesky case (N.D. Ill. 2013)

Because of discovery of data purge, discovery allowed into document retention policies, litigation hold letter and documents of steps party took to institute hold; no bad faith needed

Attorney- Client/Work Product Issues

- Preliminary drafts of contracts protected by attorney-client privilege
- Some courts have found portions later released or intended to be released to public not privileged
- Sword/shield: Can waive privilege by disclosure – subject matter waiver? (Fed. R. Evid. 502)
- “Two Hats” – Attorney as officer and counsel for company

PRIVILEGE



Sample Policy on Drafts

- The Drafts subfile should contain only one clean, unmarked copy of each draft of a document received by or prepared by and circulated outside the Firm. All other drafts should normally be destroyed when the file is sent to offsite storage.
- As a general rule the file should not include internal draft documents, which we have not circulated to anyone outside of the Firm, or documents marked with handwritten comments, except when we have circulated the marked copy to a client, opposing counsel or other persons outside the Firm.
- An individual partner may conclude that on a particular project it is important to retain marked copies or internal drafts that have not circulated outside the Firm.
- When a partner believes that marked copies or internal drafts should be retained in the official file and the practice group head concurs, the secretary who maintains the files should segregate the marked copies in a separate drafts or memoranda file which properly identifies the drafts as marked or working copies.
- When the project is complete, the partner should reevaluate the decision to retain these copies. In most cases, the Firm believes that marked copies do not add a meaningful history to the file.
- Usually these copies reflect the correction of drafting or other errors, without casting any meaningful impression of the parties' intentions.
- Lee R. Nemchek, *Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools*, Law Library Journal (Winter 2001).

The Company Witness

- Depositions, Trial Witnesses
 - The Document/Data Collectors
 - The Negotiators
 - The Performers
 - The Lawyers



Preparation is Key!

Personal or Company Deposition

- Personal
 - Limit to what knows, personal capacity
 - Limit preparation
- Company Deposition
 - Speak for and bound company
 - Beyond personal knowledge, preparation
 - Can be any witness

"[P]roducing an unprepared witness [under Rule 30(b)(6)] is tantamount to a failure to appear that is sanctionable under Rule 37(d)."

In-House Counsel As Witness

- ✓ Must prepare to testify corporate facts

- ✓ Goes beyond attorney's personal knowledge

- ✓ Privilege/Work Product - cannot be blanket objection - "unworkable circumstance"

Ethics Issues

- “Two Hat” In-House counsel
 - Act as business partner could hurt claims of privilege
 - Courts becoming more hostile to privilege of business/legal communications
 - Recommended steps
 - properly mark privileged communications
 - set out the legal purpose of your communication
 - separate business advice from legal advice
 - train the business personnel on the difference between legal and business advice

Ethics Issues

■ Outside Counsel as witness

ABA Model Rules of Professional Conduct 3.7

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Even if could be counsel, does company want that dual role?

Concluding Thoughts

- One ounce of good contract drafting is worth more than a pound of litigation costs.
- Pick the right lawyer to draft the contract and remind them boilerplate can burn you.
- If there was a contentious term that was heavily negotiated, aim for preserving documents relating to it.
- Determine if suit vs. modification is better
- Know how to preserve (texts!)
- Be careful about privilege issues-business advice v. legal



Questions

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Important Note

This presentation provides general information as to selected issues.

It is not legal advice and should not be used as a substitute for review of your specific situation with legal counsel.

Efforts have been made to provide accurate information; however, we advise you to seek counsel and advice from a qualified lawyer regarding legal matters. Legal obligations may vary according to the facts and circumstances, as well as the jurisdiction.