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Managing Litigation for the Non-Litigator

*Controlling Costs, Protecting the
Company, and Achieving Results*

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UNCLE BERNIE'S LITIGATOR FARM



Litigation Myths

- *Lawsuits are unpredictable*
- *Costs are uncontrollable*
- *It is impossible to budget for litigation*
- *Cases never go to trial, so preparing for trial is a waste*
- *Litigation is war, a sports contest, or won through bravado*
- *Outside counsel are, by definition, expensive and inefficient. They see every problem as a nail and believe every nail needs the biggest hammer*





Case Management - *A Business-First Approach*

- *Litigation strategy must be driven by business **risks** and **desired outcomes***
- *Requires an **early investment** in order to:*
 - *Know the facts*
 - *Value exposure*
 - *Define objectives*
 - *Outline potential outcomes and alternatives*
 - *Decide how the case should end*
- *Requires **collaboration** with outside counsel*
- *Requires **communication** with executives, management, company witnesses, and other stakeholders*



Planning a Successful Litigation Strategy

**Triage
&
Fact Finding**

**Strategy
&
Budget**

Implementation

Communication

Assessing the Risk – Three Cases



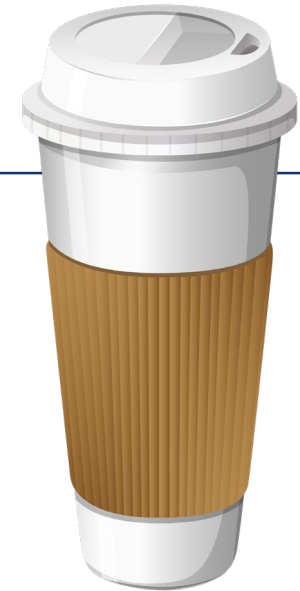
Small

- *Limited financial exposure*
- *Low reputational risk*
- *Routine employment, personal injury, or commercial disputes*



Medium

- *Increased financial exposure*
- *Greater reputational risk*
- *Non-compete, trade secret, disputes with competitors, large-scale contracts*



Large

- *“Bet the Company”*
- *Significant monetary exposure and brand risk*
- *Class actions, antitrust, governance and merger disputes, key patents and trade secrets*



Assessing the Risk – Three Cases



PaperCo. v. MidCo. -- Office administrator exercises termination provision one year into a two year contract with office equipment vendor, because it has been failing to perform. Vendor sues for balance of contract, \$150,000.



Troll Co. v. MidCo. – MidCo. enters confidential negotiations with a startup with software solution similar to one MidCo. has been trying to develop in connection with an ancillary product line. No deal is reached, and MidCo. completes development on its own. Troll Co. sues in NC Business Court, alleging breach of the NDA, unfair competition, and theft of trade secrets, seeking unspecified damages.



State v. MidCo. – Following the COVID-19 outbreak State Attorneys General investigate manufacturers and distributors of certain medical supplies, MidCo.'s main product, for alleged price gouging. The AGs file suit in federal court in SDNY. Plaintiffs' firms file copy-cat class actions alleging price fixing and violation of consumer protection statutes.

Triage & Fact Finding



Triage & Fact Finding – First Steps



- **Triggering events differ**– demand letter, civil investigative demand, subpoena, complaint
- **Where and when were you served?**
 - Time to respond to complaint can range from 21 days (federal) to 30 days (NC)
 - Subpoenas - time to object is often only 10 days (in NC), even if the return date is much later
- **Who was served and who is named as a defendant?**
 - Proper entities named? Multiple entities within the corporate structure?
 - Individuals, directors, officers, employees, who might need separate representation?

Triage & Fact Finding – First Steps



- ***Consider whether inside, or outside, counsel should conduct initial fact-finding investigation***
- ***Maintain attorney-client privilege / work product doctrine***
 - Clearly mark “attorney-client privileged” communications, but don’t overuse
 - Give *Upjohn* warnings when interviewing employees, and record in interview notes
 - Best to use outside counsel if:
 - In-house counsel serves as both business and legal advisor
 - Matter is highly sensitive
 - Investigation will involve complicated questions of ESI
 - Matter involves executives who require separate representation

Triage & Fact Finding – First Steps



- ***Determine if relevant contract includes (i) choice of law; (ii) forum selection; or (iii) mandatory arbitration clause***
- ***Review any public communications or press releases to ensure they are accurate, do not provide more information than is necessary, and do not contain any hurtful admissions***
- ***Identify employees involved and relevant information***
- ***If appropriate, collect key documents central to the case***

Triage & Fact Finding – First Steps



- ***Issue a litigation hold***
 - Required whenever litigation is (1) commenced or (2) reasonably anticipated
 - Identify subject matter of dispute, and instruct employees not to preserve, and not delete, any related information
 - Include electronically stored information – text messages, mobile devices, etc.
 - Instruct employees to direct questions to in-house counsel
 - Work with IT to ensure auto-delete functions turned off for relevant employees
 - Track who receives hold; better to be over-inclusive
 - Follow up with more formal hold when outside counsel is retained, and send periodic reminders during litigation

Triage & Fact Finding – First Steps



- ***Determine if matter is covered by insurance***
 - Review relevant policies to identify coverage issues
 - Policies often require notice within short period of time (often 60 days)
 - Notify all carriers who may provide coverage
 - Relevant time period for coverage - “claims made” vs. “occurrence”
 - Primary & excess coverage
 - Who selects outside counsel under the policy?
 - Determine whether it is obvious at outset that company will need coverage counsel

Triage & Fact Finding – Early Case Assessment

- *For all but the simplest cases, should be a written document that sets out:*
 - Facts known from initial investigation and review of key documents
 - Estimation of exposure / value of claim, broken into components
 - Governing law (elements, jury charge, open questions)
 - Legal and factual issues in dispute, including “bad” facts
 - Assessment of opponent’s case
 - Each side’s key themes
 - Proposed litigation strategy
 - Evidence needed to establish case



Triage & Fact Finding – Early Case Assessment

“Four Knowns”

Known Knowns <i>Things we know we know</i>	Known Unknowns <i>Things we know we don't know</i>
Unknown Unknowns <i>Things we don't know we don't know</i>	Unknown Knowns <i>Things we think we know, but don't</i>



Triage & Fact Finding – Early Case Assessment

Considerations & Cost Saving Tips

- *Remember “garbage in; garbage out”*
 - The more that can be done to organize documents as they are collected and retain context, the more efficient outside counsel can be
 - E.g., file structure; timeline / chronology; “inbox” organization
- *Name a point person for litigation “asks”*
 - Can be in-house counsel, specific person from business with knowledge of the case, or sometimes a combination
- *Consider use of sharepoint site to collect and organize documents*



Triage & Fact Finding – Early Case Assessment

Considerations & Cost Saving Tips

- *Involve IT, accounting, and finance early if they are going to be needed*
 - (IT Is almost always going to be needed)
- *Prepare and send background documents to give context*
 - *Org charts*
 - *Data maps*
 - *Company description*



Triage & Fact Finding – Early Case Assessment

Considerations & Cost Saving Tips

- *Stress importance to witnesses and staff who are needed to gather relevant information*
- *Consider staged interviews*
 - Often works best to interview witnesses twice
 - (1) an initial custodian interview to get an overview and key documents
 - (2) a more in-depth interview, addressing any key or bad documents



Strategy & Budget



Developing the Business Strategy and Budget



"We don't have to win, we just have to tie this up in court until the end of November."

Developing the Business Strategy and Budget

- *What does success look like?*
- *What is the company's risk appetite?*
- *How will you achieve this?*



Developing the Business Strategy

PaperCo v. MidCo



- *What does success look like?*
- *What is the company's risk appetite?*
- *How will you achieve this?*

Developing the Business Strategy

Troll Co v. MidCo



- *What does success look like?*
- *What is the company's risk appetite?*
- *How will you achieve this?*

Developing the Business Strategy

State v. Mid Co

- *What does success look like?*
- *What is the company's risk appetite?*
- *How will you achieve this?*



Litigation Budget



“Would everyone check to see they have an attorney? I seem to have ended up with two.”



Litigation Budget



- *Budgeting for litigation is hard, but that does not mean it cannot be done*
- *Define object and scope of litigation first*
- *Budget should be broken into at least key phases*
 - Initial Investigation and Answer
 - Pre-Trial Motions (Motion to Dismiss; Transfer Venue, etc.)
 - Discovery
 - Summary Judgment
 - Trial Preparation and Trial
 - Post-Trial Work (enforcement, motions)
 - Appeal (if applicable)



Litigation Budget



- *Breaking each phase into discrete tasks leads to more predictable results, e.g.,*
 - *Prepare initial disclosures*
 - *Prepare written discovery to plaintiffs*
 - *Respond to plaintiffs' written discovery*
 - *Negotiate scope of document production;*
 - *Collect company documents*
 - *Brief and direct contract reviewers*
 - *Quality check and production of documents*
 - *Preparation and defense of company witnesses*
 - *Depositions of plaintiff and plaintiffs' witnesses*



Litigation Budget



- *Other Considerations*
 - *Tie budget to “decision points” in litigation so you can inform decision makers and know when to take an off ramp*
 - *Inform outside counsel if budget needs to be in particular format*
 - *Revisit budget with outside counsel on periodic basis; set schedule for regular updates*
 - *Set “circuit breakers” – required check-ins if certain limits are met or likely to be exceeded*



Litigation Budget



- *Other Considerations*
 - *Large or truly uncertain cases – budget for initial tasks, with estimates to be revisited in the future*
 - *Do not forget expert witness fees, contract reviewers, litigation support, etc.*
- *Use litigation budget to discuss potential cost savings*
 - *Staffing*
 - *Blended rates*
 - *Division of labor between co-defendants*
 - *Tasks that can be preformed in-house or outsourced to a legal services vendor (ESI vendor, etc.)*



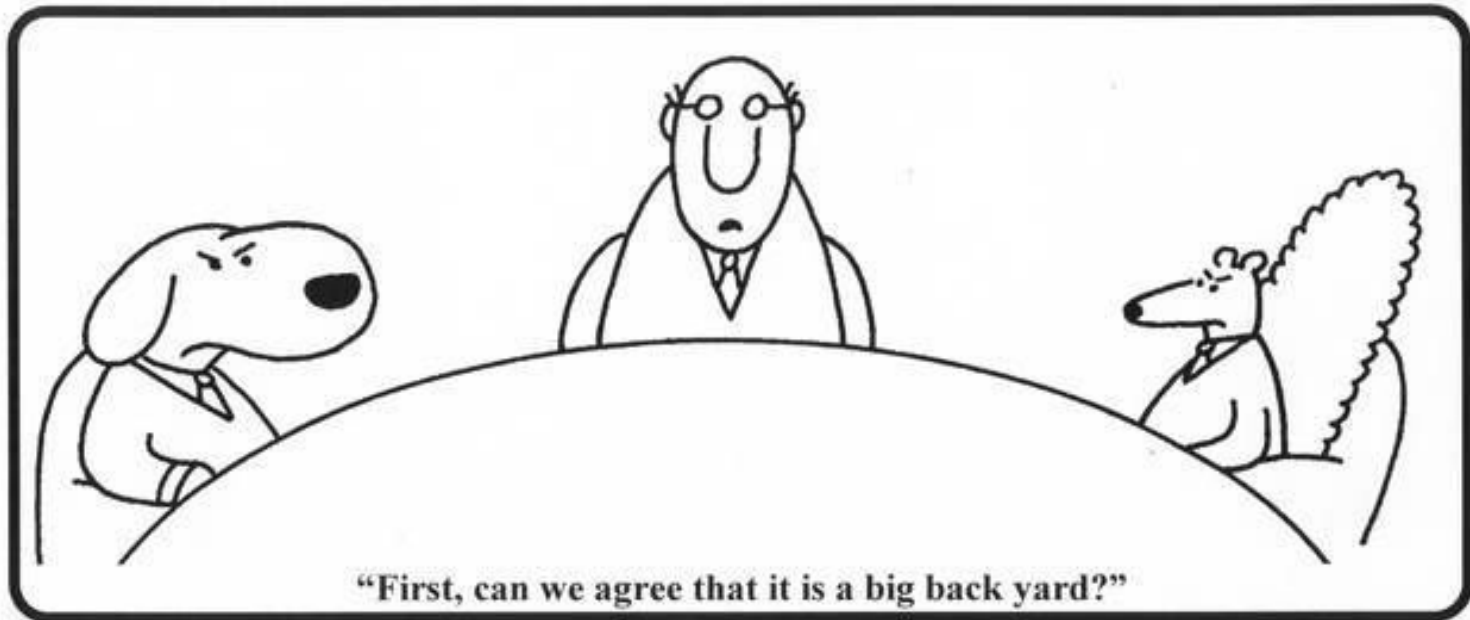
A note on mediation...

NORTH CAROLINA BUSINESS COURT RULES

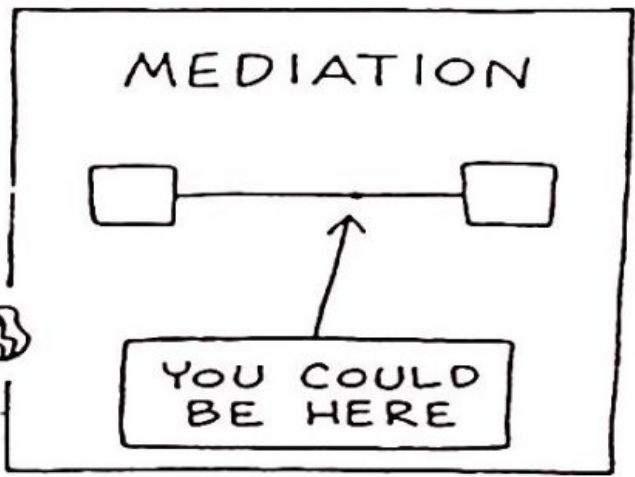
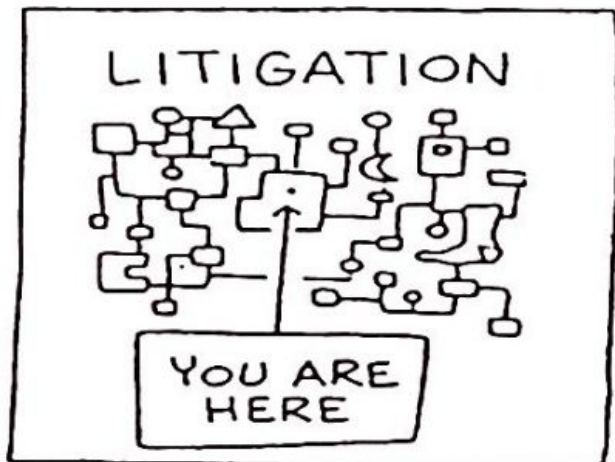


CODIFIED BY THE OFFICE OF ADMINISTRATIVE
COUNSEL, SUPREME COURT OF NORTH CAROLINA





“First, can we agree that it is a big back yard?”



Implementation



Implementation

“No plan survives contact with the enemy”

“Plans are useless, but planning is essential”

– Dwight D. Eisenhower

*“Everyone has a plan until they get punched
in the mouth”*

– Mike Tyson



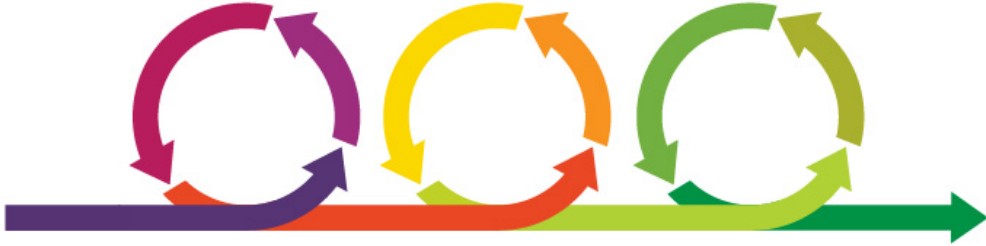
Implementation – Phases of Litigation

- *Answer & initial motions*
- *Written discovery*
- *Document production and review*
- *Depositions*
- *Expert discovery*
- *Summary Judgment*
- *Pre-Trial and Trial*
- *Post-Trial & Appeal*


Implementation – Phases of Litigation



VS



Implementation – Phases of Litigation


INITECH

T.P.S REPORT
COVER SHEET

Prepared By: _____ Date: _____
System: _____ Program Language: _____ Platform: _____ OS: _____
Unit Code: _____ Customer: _____
Unit Code Tested: _____

Due Date: _____ Approved By: _____
Test Date: _____ Tested By: _____
Total Run Time: _____ Total Error Count: _____
Error Reference: _____
Errors Logged: _____ Log Location: _____
Passed: _____ Moved to Production: _____
Comments: _____

C O N F I D E N T I A L



Implementation – Coordinating the “Asks”

- *Each phase requires “asks” from the company*
 - Information, witnesses’ time, documents, affidavits, review of written discovery responses or facts in briefs
- *Designating a point person to coordinate company response is critical*
- *Outside counsel should identify needs well in advance (normally before brief or motion is drafted) to ensure requests do not impose undue burden on employees / business operations*

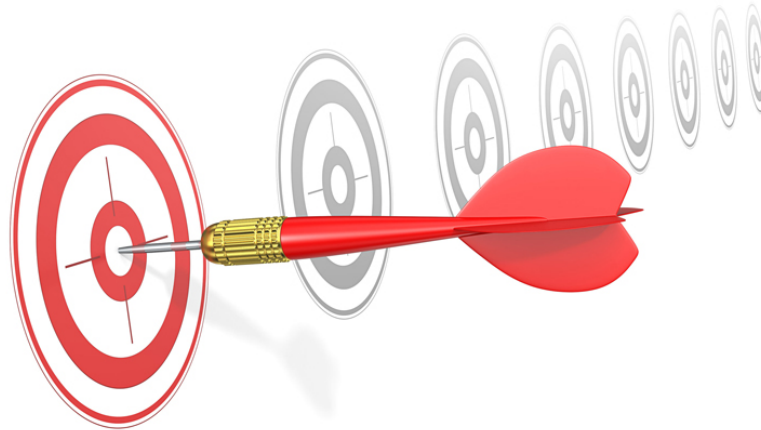


Implementation – Coordinating the “Asks”

RFP No.		Notes / Objections	Responsible/ Status
1	All communications regarding contract . .	Objection – overbroad; burden; negotiating custodians / search terms	
2	Accounting statements showing sales of infringing product	Objection – confidentiality; need protective order with AEO designation	
3	Notes, memoranda, and technical documents regarding R&D of product	Objection – confidentiality; need protective order with AEO designation	



Implementation – Accuracy and Precision



- *Participation of in-house counsel and company witnesses is critical to ensure accuracy*
- *Often cases, and trials, are decided on the maxim that “the first liar loses”*

Implementation – When the Juice is Not Worth the Squeeze



Implementation – Answers & Motions to Dismiss

- Beware of the “shotgun” or “knee-jerk” motion to dismiss
- Consider whether Plaintiff will be allowed to re-plead complaint
- Ill-advised motions to dismiss often given plaintiff chance to improve his or her case
- Consider partial motion to dismiss



Implementation – Discovery

- *Litigating an objection is often more costly than simply producing documents / information*
- *Concerns over disclosure of sensitive information can often be resolved with consent protective order*
- *Analytics can tell you which search terms are worth fighting over*
- *NC State & Federal Courts – require parties to exhaust meet-and-confer process before coming to the court*
- *Best posture - “aggressively practical and aggressively civil”*



Implementation – Document Collection



Implementation – Depositions

- *Defense is good offense*
- *In-house counsel should help ensure executives and employees give adequate time and attention to preparation*
- *Consider attending depositions of critical witnesses and require an “after-action” report after depositions*



Implementation – Motions / Summary Judgment

- *Motions should serve overall objectives and strategy*
- *Discuss motion and brief with outside counsel before it is drafted*
- *Arguments often evolve as briefs are written-- outside counsel must leave adequate time for review before filing*
- *Start with elements needed for SJ (or Jury Charge) and track through discovery*



Implementation – Why for Trial?

Why prepare for trial if virtually all cases settle?



Decline of civil jury trials in NC Superior Court

(number of cases where jury impaneled)

FY 1999-2000	694	FY 2009-10	329
FY 2000-01	589	FY 2010-11	298
FY 2001-02	527	FY 2011-12	295
FY 2002-03	481	FY 2012-13	312
FY 2003-04	481	FY 2013-14	242
FY 2004-05	434	FY 2014-15	184
FY 2005-06	439	FY 2015-16	167
FY 2006-07	349	FY 2016-17	143
FY 2007-08	303	FY 2017-18	107
FY 2008-09	325		

Source: NC Administrative Office of the Courts

Implementation – Why Prepare for Trial?

- *Preparing for trial keeps constant pressure on the other side, especially since many plaintiffs' firms seek to minimize investment in the case*
- *Ensures company is not caught flat-footed if case does have to go to trial*
- *Active discovery, coupled with early and ongoing communication with opposing counsel, can often produce settlement*



Communication



Communication



- Internal communications
- External communications
- Outside counsel communications



Communication *Internal*



- *Identify Internal Stakeholders*
 - *Business Unit*
 - *Management*
 - *Decision makers*
 - *Likely witnesses/custodians*

- *Remember to Protect/Preserve Privilege*

Communication

External

- *Media inquiries*
- *Customer inquiries*
- *Other marketplace inquiries*



Communication

Outside Counsel




- *Who is their main point of contact?*
- *What is your role as in-house counsel?*
- *How do you want to receive updates?*


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WBD Knowledge Team   

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November 2017



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