

Lawsuits are Survivable

Unlike football, winning isn't everything, nor is it the only thing

By Jon Pfeiffer

Litigation is an unfortunate, and seemingly inevitable, by-product of doing business in today's world. A lawsuit can cripple even the most successful company. With a systematic strategy, however, lawsuits are survivable.

Get Involved

The first and most important factor in surviving litigation is to define your objectives. Unlike football, winning isn't everything nor is it the only thing. Your objective may be to resolve the dispute as quickly as possible and to preserve the business relationship. It may be to recover as much of the money you are owed without forcing the other party into bankruptcy. Or, your objective may be to win the suit while sending a message to your competition.

Once your primary and secondary objectives have been identified, you should work as a team with your lawyer to explore the available methods for achieving those objectives. There are many ways to approach a case, but some tactics may be inconsistent with the ultimate objective. The goal here is to sift through the available alternatives to determine the best methods for achieving your objectives.

Mapping strategy and allocating the resources necessary to implement that strategy forges a bond between the attorney and the client. It helps create a winning team — a team with the goal of resolving disputes as effectively and economically as possible.

Budget

Attorneys fees and expenses are seemingly an unpredictable cost. On the other hand, if your company is to survive it must plan ahead. Legal costs, while not fixed, can be predicted through the use of a litigation budget. The best time to begin the budgeting process is at the beginning: at the time the dispute arises or at the beginning of a quarterly financial period or fiscal year.

At the heart of a litigation budget is its assumptions. A comprehensive set of assumptions reflecting the anticipated course of the litigation is crucial to the formation of an accurate budget. It is the foundation upon which the budget is built. Your involvement is necessary because you undoubtedly possess valuable information about the other party's motivations or agenda that could drastically alter budgeting assumptions.

If you helped develop litigation objectives and the means to achieve those objectives, you've already taken a huge step in forging the course of the litigation. The budgeting process is simply a matter of assigning a cost to your chosen litigation strategy so that a cost-benefit analysis can be made.

When circumstances change and unanticipated events occur, as they often do, a revision of the budget may be warranted. Having been involved in the initial planning you will be in a better position to react to any unforeseen events.

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Consider ADR

Alternative dispute resolution — or, as it has come to be known, ADR — provides businesses with the necessary tools to avoid the devastating impact of prolonged litigation. ADR typically falls into three categories: arbitration, mini-trial and mediation. It permits parties to circumvent the backlogged court system and resolve disputes faster than would be ordinarily possible.

ADR benefits the parties most in cases where they wish to preserve an existing business relationship. Relationships that took years to build are nearly guaranteed to be soured overnight by a hard-fought lawsuit. ADR helps to avoid that problem by bringing everyone together in a less adversarial setting and by fostering open communication.

ADR isn't appropriate for every case, but in the right situation the use of ADR can avoid years of legal fees and court costs. It is particularly suited to disputes with a smaller amount of money at stake but potentially high legal expenses.

Stay Involved

Staying involved parallels the advice to get involved but staying involved is tougher to do. It's natural to take an active role when the shock of the suit is fresh. The real challenge is sustaining your involvement.

It is helpful to meet periodically with your lawyer to discuss strategy and update the budget. At a minimum, ask questions and give suggestions. You know more about the underlying facts of the dispute than anyone else and your insight is invaluable.

Prepare in Advance

Why are some businesses always embroiled in litigation while others navigate clear of the courts? Successful companies stack the deck in their favor with proactive planning. For example, before you agree to work with a new customer or client, do your homework. First, ascertain who will be responsible for the debt, then determine whether they have the ability to pay. Next, set ground rules — tell customers when payment is expected and then stick to the policy.

Read and understand contracts before you sign. Ignorance of the terms and conditions of an agreement isn't a defense. Contracts are binding whether you read them or not. And, as a practical matter, it is impossible to comply with the terms of an agreement without knowing what they are.

Finally, don't make promises you can't keep. Broken promises are the fuel of commercial litigation. Promises create expectations. We are expected to follow through on what we promise. Suppliers, customers and business associates rely upon our promises and act or don't act accordingly. If we don't keep a promise we let everyone down.

The key to surviving litigation is involvement. Active involvement will impact the outcome of litigation and, quite possible, the success of your business. ■