



Litigation management for the in-house generalist: The commencement phase

The decision to commence litigation should not be undertaken lightly or without substantial deliberation with the business team

BY ERIC LAMBERT, MICHAEL GEIBELSON

Law school taught us what litigation is supposed to look like in broad strokes. But for in-house attorneys at companies with no dedicated litigation attorney or paralegal, or with no history of litigation, the complaint left on your desk by the general counsel with the note “Can you manage this?” is daunting. Litigation management presents a new set of challenges and responsibilities to an in-house generalist’s already crowded plate. Many learn litigation management through a “trial by fire.” But an understanding of litigation management shortens the learning curve, increases the ability to contribute to the strategic direction of the business and the case, and better balances litigation costs with potential results.

While the facts of the dispute and special procedures within individual jurisdictions may alter things, six litigation phases commonly recur:

- 1. The commencement phase:** Whether the company is to be a plaintiff or a defendant, numerous things happen (or should happen) before a complaint is filed. A litigation hold can be issued. An unfiled claim can be tendered to an insurer or an indemnitor. Counsel can be retained. And conference with co-parties can define the litigation strategy.
- 2. The pleading phase:** During this phase, the parties exchange pleadings and preliminary motions that set the bounds of the case.
- 3. The discovery phase:** Discovery is often the most costly phase of litigation, and the most time-consuming. This phase includes the exchange of documents and information, voluntarily or on demand of another party.
- 4. The pre-trial phase:** As litigants ramp up their final preparation for trial (and in many cases, settlement discussions), this phase commonly includes specialized hearings such as a claim construction hearing in patent litigation

and motions for summary judgment.

5. The trial phase

- 6. The post-trial phase:** Litigation is often active well beyond the end of a trial, even before an appeal is taken.

The commencement phase

When served with a complaint, a company’s options are more limited than when it decides to commence litigation. However, several common principles apply to both. Perhaps chief among them is maintaining a watchful balance of the business objectives of the claim against the resources and costs devoted to the litigation.

The decision to commence litigation should not be undertaken lightly or without substantial deliberation with the business team. Indeed, litigation is often (and rightly) viewed as a remedy of last resort to enforce companies’ rights. When the need to commence litigation arises, in-house counsel should:

Review the dispute history and meet with the business team. Meet with appropriate business teams and personnel to learn as much as possible about the dispute. Identify those who may have been involved in the business relationship or have relevant documents or records.

Develop litigation themes. Identify the potential themes to tell the story of your case. Themes used to synthesize the facts and points to the judge and jurors at trial are often simple—e.g. “David versus Goliath” or “greed”—and draw upon incontrovertible truths, morals and societal expectations of fairness. Themes also equip you with talking points to explain the litigation to senior management, corporate and expert witnesses, and others.

Explore a pre-litigation settlement. Evaluate whether a call to counsel (or a business

team leader) for the other side to seek a settlement could bear fruit. Determine if a mandatory dispute resolution process must be followed before filing suit. Be mindful of ethical obligations not to communicate with represented parties when a business partner asks you to sit in on a call with his business counterpart. Ensure the dispute has been escalated to a senior executive and determine whether a more senior level call between the two parties may help resolve the issue without litigation. Consider whether a drafted (but unfiled) complaint may foster settlement, but be mindful that it could also result in a race to the courthouse. The most cost effective way to manage litigation is usually to avoid it.

Review the agreement. Thoroughly review agreements that give rise to litigation or control its process. Choice of law and venue provision will help determine where to file a lawsuit and retain local counsel. If there is an attorneys’ fees provision, reconsider the likelihood of success on the merits. Review for confidentiality language to determine whether filing an action could breach the agreement; if so, consider whether to file a complaint without confidential information in it or whether to file it under seal. Comply with any required arbitration or other dispute resolution process prior to filing litigation.

Issue a litigation hold. Litigation holds alert company personnel to the obligation to preserve potentially relevant documents—an obligation that arises when a company reasonably anticipates litigation.

Retain counsel. Once the need and likely venue for litigation are known, retain qualified outside counsel who will help ensure success manage the case effectively.

Review the litigation goals, process, costs, and evaluation of your position with management. Ensure you meet with appropriate senior executives to review

the litigation goals, the process, the cost estimate and the likelihood of success. Discuss the estimated costs with your CFO or controller so an appropriate reserve can be created. Setting senior leadership's expectations early on ensures that you have appropriate buy-in, and occasionally may cause decision-makers to rethink whether the desired outcome is worth the costs of litigation.

Identify any insurance or indemnity. Review insurance policies and agreements to determine whether your claim may be covered by insurance or an indemnity obligation.

Review the summons and complaint. Carefully review the summons and complaint drafted by outside counsel to ensure it accurately reflects the dispute, claims and desired relief before it is filed or used as a stick to drive settlement.

Hold a cross-disciplinary meeting of the business team(s). To get the resources necessary to manage the litigation, the business teams' buy-in from the outset is essential. A cross-disciplinary meeting of the involved business team leads helps set expectations, secure the commitment to participate in the action, and understand the boundaries of the business objectives involved in the dispute.

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