

10 Tips for Deciding When to Litigate

By Marwa Elzankaly

In his 2016 State of the Union Address, President Barack Obama said the U.S. currently “has the strongest, most durable economy in the world.” This should come as no surprise, especially for those of us in Silicon Valley. With a quick search on the Internet, you can find just about anything you seek. With increasing business opportunities and ideas, however, comes the potential for conflict and increased litigation.

Determining the best way for your client to resolve conflict and whether to proceed with litigation is a business decision that must be made with the big picture in mind. It is imperative to evaluate your client’s goals and assess any potential business impacts. Litigation is serious business. In the midst of high emotions over a deal gone awry or a competitor’s unscrupulous methods, it is important to help your client take a deep breath and carefully weigh some key factors:

1. THE LAW AND THE FACTS

Evaluating the merits of a case seems like an obvious first step, but it must be more than an initial cursory review. Take a close and careful look at the law and the facts. Be sure to look at important documents and talk to those involved. Often, cases are decided based on a simple distinguishing fact or subtle exception to the law. In addition to helping your client decide whether to pursue an action, doing your due diligence early on will allow you to frame your claim carefully and may avert early challenges to your lawsuit.

2. EXPENSE

Litigation expenses vary, depending on case complexity, number of parties, witnesses, consultants and experts involved, potential for early resolution, the risk of protracted litigation and appeals. Litigation expenses can be managed in various ways, including developing case budgets, using outside litigation services for various matters, or

working out alternative fee arrangements. Also, consider whether there is a provision in a written contract or a statute that gives the prevailing party the right to recover attorneys’ fees. This may or may not work in your client’s favor and is usually limited to what a judge considers “reasonable.”



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3. DISRUPTION TO YOUR BUSINESS

Keep in mind the time and energy your client may have to expend. This includes educating counsel and experts on the facts and the business; reviewing, gathering and preserving electronic evidence and information; responding to discovery and potentially subjecting company leaders and employees to depositions and trial testimony. Do not forget to also consider how your client’s decision may affect employee morale.

4. ULTIMATE GOAL

Carefully assess your client’s priorities. If they are looking for a monetary recovery, consider the amount of damages at issue, including potential punitive or treble damages. Equally important is the opposing party’s solvency or whether the recovery is covered by insurance. A case may still be worth pursuing if your client is seeking injunctive or equitable relief, ordering the opposing side either to refrain from doing something or to take some affirmative action that is equally or more important than monetary damages. Injunctive relief can often be obtained early on in the form of a temporary restraining order or preliminary injunction. Such orders not only provide immediate, although

temporary relief, but give you the court's preliminary assessment of the merits of the claim. Finally, in some cases, a claim may be important to set a precedent for future business dealings. Understanding your client's ultimate goal will help you assess the best method to resolve a particular conflict. If litigation is not feasible, there may be alternative methods to pursue, such as rearranging business operations or taking preventative action.

5. PUBLIC PERCEPTION AND REPUTATION

Public perception and reputation are key to good business. Depending on the subject matter, litigation may generate public interest. Think about how your client, or their case, may be portrayed in the media or among business partners and colleagues. Be proactive and work with your client to have a strategy in place, such as a comprehensive media plan or formal company statement, to address any issues without compromising the litigation.

6. RELATIONSHIP WITH THIRD PARTIES

Disputes often involve third parties. Consider whether your client's suppliers, customers, competitors, or others may be drawn into the litigation either as witnesses or new parties. Be sure your client understands any such risk. Weigh the litigation's importance against the potential risk to these relationships and how your client may be able to protect those relationships.

7. RISK OF DIVULGING PROPRIETARY INFORMATION

Risk is inherent in any litigation and most often arises through discovery. Your client may be required to produce proprietary information, which could be detrimental to their business. Factors such as the issues raised by the action or whether the case is heard in federal or state court will determine the level of risk. Although you may secure a protective order, limiting the use or disclosure of proprietary information, consider the risk of a potential "leak." On the other hand, the opposing side may face a greater risk if required to produce their proprietary information. Cases are often resolved based purely on discovery and that risk alone may bring them to the resolution table.

8. OPENING THE DOOR TO MORE LITIGATION

In an effort to gain an advantage, cut losses, or subject a client to the threat of extensive discovery, your opponent may file cross or counter-claims or join new parties. Discuss with your client the merit of such potential claims and their effect on the litigation. Such claims can increase litigation expense and distract the court from the real issues. On the other hand, a cross-claim can trigger insurance coverage and provide your client with the resources to defend such a claim. Consider also any information that may come out in discovery and potentially subject your client, or the opposing party, to other litigation.

9. THE OPPOSING (OR CO) PARTY

It is likely the opposing party, or even a potential co-party, has similar considerations. Work with your client to evaluate their primary risks or concerns. You may be able to use that to your client's advantage.

10. STRATEGIC RESOLUTION

Cases are often resolved early on or without litigation. Discuss with your client how this can be done without compromising their case. Rather than sending angry emails or making threats, a simple phone call may get the parties talking. You may be able to resolve the matter informally through early mediation or other alternative dispute resolution. Sometimes, opposing parties are even able to reinstate their working relationship.

Decisions about how to resolve conflict and whether to pursue litigation cannot be done in a vacuum. You must consider the needs of your client's business. Far greater than the conflict at issue is the ultimate need for the business to run smoothly and profitably.

Tread carefully when considering litigation. Be sure to maintain open communication with your client, weigh all relevant factors, and plan the best course of action.

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