



Legal News

'Litigation pre-nup' can help avoid nasty disputes

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The concept of efficient litigation may seem a bit foreign to attorneys.

"It's been the Holy Grail," said Milwaukee lawyer Paul F. Heaton.

To that end, Heaton and others are embracing an evolving concept which attempts to curb litigation costs prior to trial.

An agreement in advance of a dispute, or "litigation pre-nup," can set parameters for expensive elements involved in a trial such as dispositive motions or discovery.

"A lot of times attorneys do this in bits and pieces along the way, but why not take a comprehensive look at the front end," said Heaton, of Gass Weber Mullins LLC. "Set some rules early in a lawsuit to get where you are going with less conflict and less expense."

Boston attorney Daniel B. Winslow unveiled a model litigation pre-nup agreement at a Pepperdine University School of Law conference last month.

His case management format includes an underlying contract at the start of a business relationship which defines things like discovery limits and fee shifting.

The economical litigation agreement could be a "game-changer" for lawyers and business as it seeks to implement some proportionality and limitations on litigation.

"Right now you have an open-ended process," said Winslow, of Proskauer Rose LLP. "This allows you to predetermine to the dollar what a particular case will cost, whether it's billable hours or a fixed fee." Ideally, summary judgment motions and trial could be the only tasks that a civil judge would need to act upon, Winslow said.

Locally, Quarles & Brady LLP commercial litigator Daniel E. Conley is developing a pre-dispute resolution agreement that requires executives talk to each other prior to a lawsuit or mediation.

"First, you need to take it up the food chain and have the people who are actually responsible for the decisions get involved," he said.

This philosophy can be particularly useful when it comes to determining the scope of discovery in case, especially if it involves electronically stored information.

When it comes to economical litigation agreements, one size does not fit all. But there are some general inclusions that attorneys can consider when first dealing with the other party.

Pick up the phone: Prior to or even immediately after a dispute, contact other parties involved to discuss the possibility of pretrial agreements on elements such as motion limits, discovery or fee arrangements.

Formal or Informal: Agreements need not be binding, but decide whether an independent attorney will be hired to determine threshold issues, should executives be involved, and limits on electronic discovery.

Explore Settlement: If parties concede to an agreement, evaluate if mediation is an option to resolve the dispute, rather than litigation.

Not Just Lip Service: Follow through on agreements to avoid having a judge take time to arbitrate things like discovery disputes or review lengthy motions.

Realize Limits: Pre-trial agreements can save time and money, but in some cases, prolonged, expensive litigation is unavoidable.

Whyte Hirschboeck Dudek SC attorney Rebecca Grassl Bradley frequently works with clients and opposing lawyers on pre-trial agreements to diagram discovery needs. As both a litigator and a transactional lawyer, Bradley makes use of the concept in cases where one or both sides are going to have to produce confidential business information.

In cases where competitors are involved as parties, pricing information and marketing plans are things which companies don't want others to have access to, she said.

"So we categorize things and some of it may be for attorney's eyes only," Bradley said. "More attorneys recognize setting aside confidential business information before discovery, rather than having the other side dump thousands of documents on you."

Winslow's model agreement also involves a clause that requires management to meet and negotiate prior to litigation as well as discovery limits which include a cap of four interrogatories and five document production requests for dispute claims up to \$100,000.

Discovery in federal cases can be especially expensive, Conley said, since the rules of civil procedure don't limit discovery in cases "where the game is not worth the candle."

He said in situations where one side has little in the way of electronic documents and the other has an excess, there can be a question of who should pay for discovery.

"I'm sympathetic with plaintiff's lawyers who cannot afford to deal with fee shifting provisions," Conley said. "The lawsuit itself should not be the punishment."

By establishing limits at the outset, parties may be able to come to an agreement on which side should cover the cost of discovery or other fees.

In some cases, sides may determine that the losing party is responsible for those costs.

Heaton, who does complex commercial disputes and coverage litigation, said those agreements can serve as an incentive for lawyers to get to the core of the issue in their case.

"That alone can be the silver bullet that causes attorneys to reasonably assess discovery," he said.

"Imagine if you had mandatory fee shifting. I think most disputes would be resolved in a way that saves time and money."

When it comes to dispositive motions or motions for summary judgment, attorneys can also spare the court and clients time and money by setting limits.

Agree to a truncated brief format where instead of 30 pages, it is something much more abbreviated, suggested Heaton, or agree to have a private attorney resolve threshold issues on the front end.

"It's not a one size fits all and it's still not painless, but it can knock off tens of thousands of dollars by agreeing how to handle some of those issues," he said.

In her experience, Bradley said judges typically dislike having to arbitrate discovery disputes, so it makes sense if attorneys can hash out agreements prior to filing a motion with the court.

Business clients, regardless of their size or resources, are looking for ways to manage litigation costs, which is why Bradley is recommending elements of a litigation prenup.

"In-house counsel say 'we know what this could cost, how are you going to manage the cost?'" she said.

Winslow suggested that the economical agreements could actually lead to more litigation opportunities, rather than arbitration, because they would be affordable.

"The reality is that many commercial cases are not pursued or settled because litigation costs are not sustainable," he said. "If you have a sustainable process it opens up the possibility for lawyers to litigate where it makes economical sense."

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