'Litigation prenup' to be unveiled at Pepperdine conference

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Duane Morris' Daniel Winslow

At a Pepperdine University School of Law conference in Malibu, Calif., a Boston litigator and a prominent alternative dispute resolution organization are rolling out a model contractual agreement that companies can use to limit litigation costs.

The model economical litigation agreement, colloquially known as a "litigation prenup," will debut on April 15 at the conference, entitled "American Justice at a Crossroads: A Public & Private Crisis," hosted by Pepperdine's Straus Institute for Dispute Resolution. Pepperdine spokesman Jerry Derloshon said about 125 participants are registered.

Daniel Winslow, a Boston partner and litigator at Philadelphia's Duane Morris, developed the model agreement with help from the International Institute for Conflict Prevention & Resolution (CPR Institute). Ideally, companies would incorporate the model agreement into contracts with partners, suppliers and customers at the start of the business relationship, he said.

Winslow said he formally pitched the concept to the CPR Institute's board last year. Since then, he's been fine-tuning the concept with an informal focus group of in-house attorneys from such companies as Abbott Laboratories, Bechtel Group Inc., Cisco Systems Inc., General Electric Co. and Microsoft Corp.

Winslow is known for his recent role as chief legal counsel for the campaign of U.S. Senator Scott Brown (R-Mass.), which culminated in a Jan. 20 win for Brown.

But the germ of his idea of limiting litigation costs for companies embroiled in commercial contract disputes dates back to Winslow's tenure as a Massachusetts trial court judge from 1995 to 2002.

The model agreement includes a mandatory prelitigation dispute resolution section, which includes a clause calling for executives to negotiate directly with each other. "It's amazing how often companies end up in litigation without ever actually having talked to each other," Winslow said.

The model agreement also calls for limits on discovery, including interrogatories and requests for production of documents, that vary according to the size of the dispute. Disputes involving claims of up to $100,000 for example, would be limited to four interrogatories and five document production requests. The agreement also seeks to tie the number of depositions and informal witness interviews allowed to the dollar value of the dispute.

The limits are important for smaller disputes because litigation costs can "far exceed the profit margin for a smaller contract," Winslow said. "It's very important that the process for resolving disputes about a contract bears some relationship to the value of the contract."

The contract also calls for an economical litigation agreement arbitrator to manage discovery in the case. The use of an arbitrator to enforce a discovery contract is one of the agreement's major innovations, Winslow said.

"This is a hybrid of arbitration and litigation," Winslow said. "It allows the parties to have a judge decide the case on its merits, but the process is shaped by the parties and enforced by an arbitrator through binding arbitration."

The CPR Institute plans to roll out a pilot program after the Pepperdine conference, said Kathy Bryan, the institute's president and chief executive officer.

Bryan said the model agreement is essentially a series of default provisions based on what the CPR Institute has learned and what companies are saying they need. "The pretrial process is one that we want to take more control over," Bryan said.

David Burt, a corporate counsel at I.E. du Pont de Nemours and Co. and a member of CPR's executive advisory committee, plans to attend the conference and absorb ideas to bring back to DuPont. "The fundamental problem is that the American definition of discoverability is very, very broad," Burt said. "What this leads to is looking under every rock and bringing multiple allegations that are not central to the dispute. Those two things in combination lead to rampant discovery."

Although many companies have agreements to arbitrate or mediate disputes or for senior executives to negotiate before going to court, the economical litigation agreement is a new idea, Burt said. "I foresee that it will be built into agreements once it's ready," Burt said. "There are probably going to be a bunch of different ways of using it. It's not a one size fits all solution."

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