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Proactivity and Problem Solving Are Keys to Avoiding Costly Litigation

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Litigation in California is booming. More companies are being hit with lawsuits and many companies are moving their headquarters out of California. Therefore, it makes sense to consider ways to avoid costly litigation in California.

Attorneys working in-house for California companies are often juggling a variety of tasks and the nature of the work can become reactive. To the extent that in-house counsel can be proactive in identifying potential legal issues and working with the business to resolve those issues, the companies will be in better shape to avoid costly litigation. Of course, the difficulty lies in the details. It is sometimes unclear where to focus efforts on being proactive and how to solve potential problems. The tips below are a helpful guide for in-house counsel.

1. Business Knowledge. It sounds simple enough, but understanding the company's business is critical. Not generally, but specifically understanding the inner workings of the business, the transactions, the corporate structure and hierarchy, the types of documents generated in the ordinary course of business, the types of communications within the company and with third parties, and contractual relationships that bind the company, are all important components that in-house counsel should learn. In addition, building genuine relationships with business folks and having an open door policy will allow employees to come to in-house counsel with issues, which will allow in-house counsel to proactively assess the issues from a legal perspective. Regular frank communications and interactions with employees will lead to deeper business knowledge. From there, in-house counsel may also consider holding regular meetings with other key departments involved in risk management, including Human Resources, so business information can be shared and discussed. It may seem daunting at first to become a quasi-business expert, but the benefits are well worth it, especially now with e-discovery and spoliation issues. Knowledge of the company's document storage, retention, and preservation is very helpful in attempting to minimize litigation costs.

2. Internal Policies, Protocols, and Contracts. The type of policies, protocols, and contracts will depend on the nature of the business and types of products or services. Without discussing all potential options, in California it is a hot bed for employment litigation, so updating employee handbooks, conducting training, and monitoring employment issues are critical. A company may also want to consider a "best practices" policy for internal and external communications by employees, including social media policies. This area of law is evolving, and staying ahead of the curve is important. Another important set of policies relate to confidentiality and trade secrets, which are now governed by California State and Federal law. Finally, the company should attempt to establish guidelines and consistent terms for contracts with third parties, and clear contracts with in-house legal prior to execution. Use of contractual provisions can save the money in the event of a dispute. For example, mediation/arbitration clauses, venue selection, attorneys' fees, limitations on liability, indemnity, right to cure, and other terms in a contract could result in avoiding litigation altogether.

3. Insurance. Most companies will maintain a commercial general liability policy, but often the policy will include various exclusions and endorsements so it is not always clear what claims are covered and to

what extent. Again, understanding the business, the contracts, and the employees will aid the in-house attorney in analyzing the policy for potential coverage gaps. Working closely with an experienced insurance broker and possibly outside counsel can pay dividends in selecting the most appropriate policy. In addition to general liability policies, the company will want to consider policies for errors and omissions, workers compensation, cyber and privacy, EPLI, and potentially other more industry-specific policies. Finally, the company should review the policies at least every year, and periodically as the business grows and/or changes over time.

4. Legal Knowledge. Staying current on laws that affect the company's business will allow in-house counsel to spot potential legal issues before they arise, suggest changes within the company to avoid legal issues, and/or help educate business folks. Legal publications, seminars, bar associations or legal organization memberships, "joint-defense" or legal strategy groups, and industry networking are all good sources for obtaining legal knowledge.

5. Outside Counsel With Expertise. Selecting the right outside counsel prior to litigation is advantageous if outside counsel already possesses expertise in the subject matter of the dispute and the relevant law. Many in-house attorneys have no choice but to wait and interview or hire outside counsel after a lawsuit is filed. However, a good practice is to vet potential outside counsel on various issues before litigation arises, and then outside counsel can assist in possibly curbing litigation before it explodes. Of course, selecting outside counsel with significant litigation experience is also crucial, because the litigator will have a unique perspective on ways to avoid costly litigation. Another important consideration is to ensure that outside counsel understands the business dynamics and company culture. Outside counsel who appreciate the culture can "bridge the gap" between legal and business conflicts and offer practical solutions.

These tips are general but practical. For more information, please contact Scott P. Shaw at Call & Jensen, sshaw@calljensen.com, 949.717.3000. Mr. Shaw is a Shareholder at Call & Jensen where he practices commercial litigation with an emphasis on intellectual property and employment.

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