Joining Forces: Preparing Clients for Litigation

Joseph S. Goode  
Laffey, Leitner & Goode LLC  
Milwaukee, Wisconsin

Laura Heltebran  
Hilton Worldwide  
McLean, Virginia
WHY THIS WORKSHOP

- Litigation typically consumes the largest percentage of a legal department’s budget
- Litigation requires partnerships with attorneys and business stakeholders/clients
- Every good Trial Lawyer needs a road map
- Planning is your friend
- Windows of opportunity must be understood
TODAY’S GOALS

- Alternatives and defining “winning”
- Identifying key actors and preserving evidence
- Navigating privilege concerns
- Insurance and indemnification thoughts
- Public relations
- The financial and human costs
- Post-mortem: learning from experience
WHAT KEEPS YOU UP AT NIGHT?

- The pre-Forum poll
- The Forum poll
- Joe and Laura’s anecdotes
IDENTIFYING KEY STAKEHOLDERS IN LITIGATION

🌟 Who are the key decision makers and stakeholders?

🌟 Are they internal or external?

🌟 Do key decision makers and/or stakeholders have competing agendas?

🌟 Who are your allies? Internal, external or both?

🌟 Who might present an obstacle?
CAN YOU CONTROL YOUR STAKEHOLDERS?

“Business executives absolutely despise not being in control, and there is nothing to match litigation when it comes to not being in control.”

Fortune 500 Company
General Counsel
NOT FOR THE FAINT OF HEART!

“Litigation is not kind to those who are tentative when the decisive moment is before you.”

Small Hospitality Company
General Counsel
COLLABORATIVE/COLLECTIVE FIRST STEPS

• Have a candid discussion of the litigation to come, including:

  • Costs and cost effectiveness
  • Potential pitfalls and the possibility of negative precedent
  • Arbitration agreements or other pre-suit requirements
  • Forum and choice of law provisions
  • Settlement considerations or opportunities
  • Correct parties named in a case
WAR OF THE ROSES

“[I am] concerned about how to manage the existing franchise relationship while litigation is pending such as when a franchisee suddenly sees an increase in default letters, inspections, and other franchisor actions after they file a lawsuit.”

Small Firm
Outside Counsel
FEAR OF THE UNKNOWN

“What bothers me most is the potential for undiscovered information during the initial case evaluation and strategy planning.”

Large Firm
Outside Counsel
MORE FEAR OF THE UNKNOWN

“Not knowing what’s out there and then finding out just steps ahead of the plaintiff...I’ve not done this but have thought about proactive compliance monitoring of emails and communications to see what is being said to licensees/franchisees; sort of an audit of each person who interacts.”

Closely Held Licensing Company
General Counsel
LITIGATION STRATEGY – IS THERE AN ALTERNATIVE PATH FORWARD?

球星 Is the matter litigation-worthy?
球星 Set your goals early
球星 Define the roles of in-house/outside counsel
球星 Who are the parties? Franchisee? Franchisor? Vendors? Others?
THROWING GOOD MONEY AFTER BAD

“Litigation is the most inefficient way ever devised to resolve business differences. Employ it only as a last resort.”

Fortune 500 Company
General Counsel
What constitutes a “win” to you or your client? Winning the case? Settlement?

What are the potential pitfalls?

- Public relations issues
- Joint liability of franchisor and franchisee
- COST, COST, COST: $$$ and personnel time

Sue, settle or ignore?
WHO’S ON FIRST?

“We like to see capable inside counsel stay involved, and with us having the green light to continue to be in touch with them, with them acting as de facto settlement counsel for the duration of the dispute resolution process.”

Small Firm
Outside Counsel
YOU GET WHAT YOU PAY FOR

“When choosing outside counsel for litigation matters, do not go cheap. Litigation, especially the big cases, is not the place to value engineer and try and save the legal budget.”

Fortune 500 Company
General Counsel
AN EFFECTIVE LITIGATION HOLD IS KEY

Zubulake v. UBS Warburg (2003)

✦ Duty to preserve evidence:
  • When a party has notice or reasonably could anticipate litigation

✦ Approach to collection:
  • Extends to key players but err on the side of caution
  • Broad discretion in how to retain electronics data—collect early and broadly
LITIGATION HOLDS IN THE DIGITAL ERA

- Identify and interview key custodians
- Work with IT to understand the landscape of Electronically Stored Information (ESI)
- “Documents” can mean hard drives, shared drives, mobile phones, flash drives, back-up tapes, paper documents, text messaging, cloud storage, etc.
- MAD Agreements
- Do you have a robust Information Governance program? If not, you need one!
  - Created and/or updated the company’s Document Retention Policy?
  - Applied an automatic E-mail Retention Policy?
- Comprehensive written instructions
BUT I DIDN’T THINK IT COUNTED!

“Clients are usually pretty good at maintaining email and paper documents but there are thousands of text messages that get overlooked.”

Mid-Size Firm
Outside Counsel
HOUSEKEEPING DURING AN ONGOING LITIGATION HOLD

- Periodically reissue litigation holds to demonstrate ongoing compliance
- Work with IT to ensure everything is being preserved
- Take “reasonable steps” so as to avoid sanctions under the new 37(e) standards
- Engaged lawyers are the key
TECHNOLOGY DOESN’T ALWAYS MAKE LIFE EASIER

- Identify ESI issues or challenges early
- Be aware of local ESI agreements
- Meet FRCP meeting obligations
- Who will pay if e-Discovery is overly burdensome?
- Sometimes the best defense is a good offense
- Honestly assess the sophistication of your client and its technology
WE’RE GOING TO NEED A BIGGER BOAT

“This is easy and maybe too obvious—ESI production is so big, and the review so reliant on the electronic search terms, that I lie awake wondering what I don’t know that is in those literally hundreds of thousands of pages I didn’t personally read because my search terms didn’t flag the doc.”

Small Firm
Outside Counsel
The Court may: Order measures no greater than necessary to cure the prejudice.

The Court may:
- Presume the information lost was unfavorable;
- Issue mandatory or permissive adverse inference instruction; or
- Enter dismissal or default.

**Rule 37(e)(1)**

**Rule 37(e)(2)**

---

*Subject to proportionality considerations*
MAINTAINING THE ATTORNEY-CLIENT PRIVILEGE

❖ A privileged communication is:

• Communication between counsel and client
  – Made confidentially;
  – For the purpose of soliciting or rendering legal advice
• #ItsComplicated!

❖ Don’t overestimate the scope of the privilege – the folly of clients believing that copying an attorney is enough to establish privilege
“I worry about the ‘conversations’ employees have over email, never thinking the words might be exposed in discovery.”

Fortune 100 Company
General Counsel
UPJOHN STANDARD


*Upjohn Co. v. United States* (1981)

- Was the information necessary to supply the basis for legal advice to the corporation?
- Was the information available from the “control group” management?
- Did the communication concern information within the scope of the employee’s duties?
- Was the employee aware that he was being questioned in order to secure legal advice for the corporation?
- Were the communications considered confidential when made and kept confidential?
THE PATHWAY TO PRIVILEGE

- Create a joint defense agreement if unrelated parties need to collaborate
- Training, training, training!
- Reinforce the difference between business and legal roles of in-house counsel (not all in-house lawyer communications are created equal)
- Factor in international privilege issues
ACCIDENTALLY WAIVING PRIVILEGE – BUT I DIDN’T MEAN TO!

❖ Forwarding or copying an attorney on an email does not automatically make the conversation privileged.

❖ Adding a non-privileged third party to a communication, even by forwarding it, will waive its privileged status.

❖ Sharing privileged information with employees that do not “need to know” that information to fulfill their job duties.
NAVIGATING POTENTIAL INSURANCE COVERAGE AND INDEMNIFICATION ISSUES

- Disputes between franchisor and franchisee—insurance coverage/indemnity unlikely so KNOW YOUR OWN POLICIES!

- Third party claims against franchisor/franchisee
  - Both parties should separately evaluate coverage/indemnity
  - The parties should attempt to coordinate on coverage
  - Who indemnifies whom?
    - In ordinary claims, franchisor will look to franchisee for indemnity
    - Does franchisee have a right of indemnity as to franchisor?
    - Regardless of indemnity, does franchisor want to handle defense?
  - Who is going to manage/control the case?
“The ease with which the cost/benefit analysis in a suit can get upside down and the uncertainty of which particular case it will happen in...I am concerned with the uncertainty over insurance coverage for franchisee claims and the insurer’s role in settlement when claims are covered.”

Large Hospitality Brand
General Counsel
Cases involving incidents at franchised business

- Franchisor is often better equipped to recognize/respond to key media issues.

- Will the issue at one location turn into a broader issue?

- Important to recognize the tension between legal obligations and public relations messaging.
NAVIGATING THE PUBLIC RELATIONS MATRIX

Cases involving dispute between franchisor/franchisee

• Who wants the media attention? Is it beneficial to one side?

• If one side seeks attention, can the other side minimize it?
THE FINANCIAL AND HUMAN COSTS

- Litigation can be expensive and time-consuming
- Hard to predict which makes forecasting and budgeting difficult
- Potentially burdensome for both Franchisor and Franchisee
- Always evaluate the impact to your brand
- Consider the consequences of potential precedent
“Understand that a company’s business records are organized according to what makes sense for the business needs of the enterprise. Litigation demands usually are an afterthought, if they are considered at all.”

Fortune 100 Company
General Counsel
MUST YOU HAVE THE FINAL WORD?

“The three hardest words any C-Suite executive can say are, ‘I don’t know.’ CEO’s especially are congenitally unable to utter those words, and in a deposition that can prove disastrous. To be clear, C-Suite executives, no matter how smart, how accomplished they are, absolutely and with few exceptions are terrible at testifying. Worst of all, they think they are great at it.”

Fortune 100 Company
General Counsel
LESSONS LEARNED

❖ The best lessons are those you can learn on someone else’s dime: stay current!

❖ What has the company learned from litigation?

❖ What changes can be made to prevent future litigation?

❖ Can you develop a playbook/dedicate specific resources for these matters?
“Never underestimate the degree to which big cases can distract big organizations from their core business.”

Fortune 100 Company
General Counsel
QUESTION AND ANSWER

You’ve got questions – we’ve got answers...