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Civil LITIGATION

Employing a 'limited defense' strategy

Talk to small business owners, and one of their biggest fears is becoming embroiled in litigation against their will, and over which they have little control. An even bigger fear is when the small business' adversaries are multi-million or multi-billion dollar corporations, with seemingly unlimited litigation budgets.

Irrespective of the merits of the claim against the small business, it has no choice but to defend itself or it risks a default judgment that may very well put it out of business. However, going toe-to-toe with a multi-million dollar corporation through years of protracted discovery, motion practice and trial may very well put it out of business as well. Given these two undesirable options, what is a small business to do?

By COLIN D. RAMSEY
Daily Record Columnist

Unfortunately, faced with the situation described above, the options are fairly limited. Again, the small business can neither afford a default judgment, nor can it engage in protracted litigation and a lengthy trial given its limited resources. Unless the large corporation is interested in discussing a settlement at a number the small business can afford (putting aside the merits of the claim), the only realistic option available to the small business may be a limited defense whereby it strategically allocates its litigation resources.

At first blush, most attorneys would be loath to undertake this type of "limited defense," as they would perceive (perhaps correctly) that a limited defense concomitantly provides a limited chance of success, and may subject the attorney to a malpractice claim if things turn out poorly for the client. However, many attorneys also have small business clients for whom a limited defense is the best option, so the attorney may wish to consider this unorthodox representation.

While the limited defense strategy may be workable in some instances, before engaging in such representation an attorney is wise to take a number of steps to both manage the client's expectations, as well as protect the attorney and firm from a potential malpractice claim.

First, if the attorney agrees to accept the representation and employ the "limited defense" strategy, the retainer agreement needs to explicitly state that the client acknowledges and understands that were it not for the financial restrictions being imposed by the client, the attorney would not recommend the limited defense strategy, and would likely employ additional discovery devices and litigation tactics that could change the outcome of the litigation.

The engagement agreement should further state that although the attorney will do everything he or she can to manage costs, there are certain aspects of litigation that are out of his or her control, and that costs may be incurred despite the best efforts to limit such costs.

To that end, if the case is large enough to potentially put the client out of business, it is likely a large enough case to warrant significant discovery, depositions and potentially motion practice. Further, given the present reliance on technology, it is likely that there will be significant e-discovery issues that need to be addressed. The question then becomes, how best to represent the client and minimize the costs, while still providing an adequate, albeit "limited" defense.

First, with respect to discovery, rather than blanket all parties with as much written discovery as possible, an attorney can specifically tailor his or her requests to only the most important issues that will ultimately affect the client's case. While an attorney will have no choice but to respond to discovery served on him or her, and the client will simply need to accept that those costs cannot be avoided, the attorney may not need to go tit for tat with the unlimited resources of the opponent.

Similarly, with respect to e-discovery and document production, many large companies engage third-party vendors to provide and store electronically-produced information — usually at a significant cost. While the small business certainly has obligations that it must adhere to as far as producing electronic discovery, it does not generally have an obligation to hire expensive third-party vendors, and may find it more cost effective to enlist its own employees in meeting its e-discovery obligations.

Next, with respect to depositions, it may be possible to strategically pick which depositions to attend — particularly if it is a multi-party litigation. This would be especially true if depositions are not local, and attending them would not only involve the expense of the deposition, but travel and lodging costs. In the event that the attorney and client can be reasonably sure that their presence at the deposition is not critical to one of the

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penultimate issues in the case, simply ordering the transcript for the attorney to review may suffice.

It should also be noted that, to the extent that the other party or their counsel is complaining about an aspect of the attorney's participation in the discovery process (or even if they are not), it is worth ascertaining whether you and your client may find an ally in the judge who does not wish to perpetuate the David versus Goliath dynamic.

While the judge certainly has an obligation to treat all parties in a fair and even-handed manner, he or she may be willing to either explicitly or implicitly assist the attorney and the client in leveling the playing field by relaxing or limiting the burden that litigation in general, and discovery in particular, places on the client.

Throughout the entire process, the client must be kept explicitly informed of the status of the case, and candidly advised if the limited defense strategy is becoming unworkable. In the event this occurs, the attorney can then direct the client back to the engagement letter, which will have disclosed this risk at the outset.

Not surprisingly, a good result for the client will obviate any fears on the part of both the attorney and the client about the desirability of such a strategy, whereas a bad result may lead to second-guessing, and in a worst-case scenario, a malpractice claim. While this risk cannot be completely discounted, a clearly defined engagement letter explicitly setting forth the risks and obtaining the client's acknowledgement and consent, should render the likelihood of a malpractice claim remote.

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