

DISPUTES

Pre-Litigation Guide – Help your lawyers, help you

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Five fundamental aspects of pre-litigation preparation

It is often difficult, if not impossible, to know if there is a dispute on the horizon and by the time you become aware of it, it is too late to take precautionary measures. There are, however, certain fundamental principles you can apply and steps you can take, in order to place you in the best possible position if commercial litigation eventuates.

This pre-litigation guide sets out 5 fundamental aspects of pre-litigation preparation that will not only improve your prospects of succeeding in litigation but could also save you a significant amount of time and legal costs.

1. Manage your company records

Conscientious record keeping is an essential component in proving a claim or defending your company against any allegations in a claim against it. Well-organised documentation will expedite the preparation process and will allow your legal team more time to develop a strong legal strategy for your matter.

Conversely, poor e-mail and/or correspondence management creates a significant risk to any company. Information exchanged and topics that are discussed over e-mails or in letters can become extremely important, months and even years after they are first created. Adopting an effective filing and classification system for all correspondence is therefore paramount to preserving potential evidence. Where your company has not yet fully transitioned to an electronic record-keeping system, it is advisable that all hardcopy documents also be electronically filed and chronologically ordered, as they accumulate.

One way of doing so is to **introduce an e-mail integration system**. This allows for the automatic saving and filing of e-mails and also incorporates any attachments. Such a system will reduce duplication and will also chronologically order the documents.

An additional measure would be to create a tracking schedule for clients or customers the company views as potential risks, from a litigation perspective. A tracking schedule would record the date on which the e-mail or letter was sent and summarise the contents therein. In addition, this tracking schedule can serve as an index to the e-mail integration filing system.

Keeping a record of phone calls and meetings (whether they be in-person or virtual) is as important as keeping a record of documentation. One way to ensure that proper records of meetings and calls are kept is to take and distribute minutes or to record the topics of discussion and/or decisions made in an e-mail following the meeting or call. This record-keeping can also be done by way of a tracking schedule. If the meeting or call is important, and there is a possibility of it becoming relevant to future litigation, taking an audio recording is another way in which to demonstrate precisely what was discussed and agreed.

When briefing your attorneys, it is important to not only provide them with all relevant documents but to also include a detailed chronology, where appropriate referencing those documents. This will ensure that all relevant documents are

included and are easily identifiable, which will ultimately facilitate your legal team's preparation process, in a cost-effective manner.

2. Mind your words

A company's documentation is by no means the only form of evidence that can be considered or scrutinised during the litigation process. Various forms of communication, **including verbal exchanges**, are potentially examinable during court proceedings (barring privileged communications). Where there is uncertainty in this regard, as a general rule it is advisable to consider and reflect before sending a strongly worded e-mail to a competitor or third party. A useful yardstick is to operate on the assumption that these communications will be utilised in legal proceedings and/or are discoverable documents.

When in doubt, liaise with your attorney before communicating with a third party, whether orally or in writing.

When dealing with a matter that is likely to become litigious, the earlier you involve your attorney to guide you in interactions with a counterparty, the better. This will avoid early steps being taken that may be prejudicial to your prospects of success.

3. Prepare air-tight agreements

Having **clear and unambiguous agreements** in place is crucial in minimising the risk of (and during) a legal dispute. It is not uncommon for well-established and commercially savvy companies to enter into problematic agreements. Obtaining advice from commercial attorneys in relation to the preparation of agreements is invariably a sound (if not crucial) investment, which ultimately enures to the benefit of a company by either resulting in litigation being avoided, or the company's risk being mitigated during such litigation.

4. Be transparent with your attorneys

Being **forthright with your legal team** forms the foundation of the relationship. The adage that an attorney is only as good as their instructions certainly bears out in litigious proceedings – if your attorney does not know all the material facts, it impedes their ability to determine the best strategic approach to a matter.

Being completely candid not only avoids your legal team from being blindsided, but it also allows your legal team to determine whether information can add value to your case or not and can save significant, unnecessary legal costs. No detail is too small, despite how insignificant it may seem.

5. Consider other forms of dispute resolution

It is important to define success in its proper commercial context, mindful of what your desired outcome is. **Court litigation can be a proverbial marathon**, going on for months (or even years) longer than you may have anticipated. Court litigation is not the only way to deal with a commercial dispute. Settling the matter outside of court is often less time-consuming and costly.

Other than being resolved directly and informally between the parties, examples of alternative dispute resolution include arbitration, mediation and settlement conferences.

Knowing what you want is paramount to this decision, as an out-of-court resolution requires collaboration as well as compromise, and is oftentimes a solution that (dis)satisfies both parties to some extent. You, together with your legal team, need to consider a strategy that best serves your business' interests and future goals.

As alluded to above, when approaching settlement it is crucial to factor in not only the risks but also the costs of litigation. The decision then becomes a commercial one, which is imperative in circumstances where disputes can often be emotionally charged.

Conclusion of pre-litigation preparation

While amicably defusing a potential dispute is often (as it should be) the first port of call, litigation may be inevitable. Your company will therefore need to prepare for this often costly and time-consuming possibility. Following these guidelines will assist in –

- avoiding litigation, where possible; and
- mitigating a company's risks, and placing the company in the best possible position in the circumstances, where litigation is unavoidable.

We have several resources for [additional reading](#).



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