Today's
GENERAL COUNSEL

Problems When Transactional Counsel Act as Trial Counsel

By Mark B. Wilson and Gerald A. Klein

Your company's agent for service of process delivers a lawsuit involving a contract that your company's law firm drafted. Given the firm's deep familiarity with the transaction, does it make sense to have that firm litigate the case?

The answer is often no. Here's why.

Transactional Counsel Might Be Called as a Trial Witness

In a perfect world, there would be no need to have witnesses testify about what a contract means. Generally, courts interpret contracts based solely on the words in the contract. But the world is not perfect, and even the best transactional firms don't always draft the perfect contract. Consequently, it is rare for contracts to be perfectly clear to every reader.

Moreover, in a complicated world with many moving parts, it is difficult for transactional counsel to foresee every possible dispute when drafting a contract. It is common for issues to arise after parties sign a contract that no one considered during the drafting process. To persuade the court that their interpretation is correct, the parties may seek to introduce evidence outside the four corners of the contract to explain the circumstances surrounding contract negotiations or the meaning of certain terms.

In such circumstances, the parties' lawyers may become trial witnesses. In California, it is unethical for lawyers to be trial counsel and trial witness on substantive issues without informed written consent.

Even with consent, it's almost always a bad idea, and the court has discretion to disqualify counsel who want to both testify and act as trial counsel to protect the jury from being misled, or the opposing party from being prejudiced. Even in those rare circumstances where a trial court would allow a trial attorney to testify on substantive issues in the trial, there is a risk that a testifying lawyer can taint the outcome of the trial. For example, if the jurors do not like the trial attorney's advocacy, this bias may negatively influence how the jury perceives the attorney's testimony. Even when a large firm has a different litigation team from the attorneys who wrote the contract, there is a danger the taint arising from advocacy could influence the evaluation of substantive testimony by the transactional attorneys.

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Potential Conflict of Interest

While legal malpractice may have nothing to do with the cause of the transactional dispute, a potential malpractice claim may cloud issues surrounding the transaction, and the judgment of trial counsel if they or members of their firm drafted the transactional documents.

Although the law in some states, including California, requires malpracticing attorneys to advise the client that malpractice is an issue,

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attorneys are understandably reluctant to confess malpractice and sometimes don't even recognize it. Therefore, it is critical for clients to hire an outsider to the underlying transaction to advise the client candidly about its chances for success in the litigation, whether there is a malpractice issue, and what steps are required to preserve the statute of limitations, which can be as little as one year from the malpractice.

When transactional attorneys testify at trial, attorney-client privilege issues can arise. Clients may decide to waive the attorney-client privilege and have a transactional attorney discuss communications with the client to advance one point or another at trial.

It is much easier to begin the waiver process than it is to end it. Waiving the attorney-client privilege can become a slippery slope where the waiver never seems to end. If the law firm handling the litigation is the same law firm involved in the transaction, the lines may become murky as to where the waiver of privilege ends and the sanctity of the litigation attorney-client privilege begins. Those lines are brighter when the litigation firm is different from the firm involved in the transaction.

AS CASES BECOME BIGGER AND MORE COSTLY, FEWER CASES ARE GOING TO TRIAL.

The Best Transaction Law Firm May Not Be the Best Trial Firm

It would be very rare for a law firm to be outstanding in every practice area. Although the transaction firm that wrote the contract might be the best transaction firm on the planet (notwithstanding the lawsuit), the same might not be said about the litigation department of that firm. The fact the lawyer who drafted the contract might not be qualified to litigate its breach may seem obvious, but it is less obvious that the litigation department at that firm might not be the best trial firm for the client.

BUILDING A TRIAL TEAM

Companies count on general counsel to pick a first-class trial team. For the reasons noted above, it is unwise to hire the firm that drafted the transactional documents to litigate them. While it seems intuitive to ask the transactional firm to recommend trial counsel, there is a risk that the recommendation will be to a "friendly" law firm that would be unwilling to discuss malpractice against the firm referring the matter.

General counsel is advised to seek trial counsel with no ties to transactional counsel. It is critical to identify the trial attorney early in a dispute and ascertain the level of involvement that attorney will have from beginning to end.

Every area of litigation has its own expertise. For example, a law firm hired to defend product liability cases against a company may not be the right firm to defend a breach of contract action. Moreover, many litigation firms are good at discovery and law and motion battles, but lack trial experience to win big cases.

The only way to become a highly skilled trial lawyer is to try a lot of cases, and often litigation departments lack that expertise. Accordingly, the search for litigation counsel should start with examination of trial experience. How many trials has the attorney handled? What was his or her role in each trial? What is the trial lawyer's win and loss record? What were the complexity levels of each case the lawyer tried? How familiar is the lawyer with the judges and the venue that will hear the case? The more that questions like these are asked, the clearer it will be that there are fewer attorneys in the legal market capable of trying the case.

It is hard to picture when, if ever, the law firm that drafted transactional documents in dispute should represent the company in a trial involving those documents. When a company hires a law firm to defend it in disputes involving transactional documents the law firm wrote, there will always be conflict issues.

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Likewise, in such situations, there will almost always be a malpractice issue hanging in the air; and hiring the same firm to defend those documents may lead to a conflict of interest and/or clouded judgment. General counsel should look at litigation involving transactional documents a prior firm wrote as a brand-new transaction requiring general counsel to hire the best trial firm qualified to defend the company in the dispute over the transaction.

Finding the right trial firm may involve looking at highly experienced small firm trial experts and marrying them to large firm support. But using the trial team of the law firm that drafted the transactional documents in a dispute involving those documents will often be a costly mistake.

Sadly, as cases become bigger and more and more costly, fewer cases are going to trial. Many of the largest law firms in the country, which handle the largest transactions in the country, now lack a stable of trial-tested lawyers. Those that remain are getting grayer and longer in the tooth. Many companies are seeking smaller firms to provide trial expertise and marrying them to larger firms to provide litigation support. These kinds of marriages, when they work, combine the experience, expertise and judgment of battle-tested trial lawyers with the immense resources of a large law firm. In the coming years, this paradigm may become the rule, rather than the exception. ■