

**ALFA BUSINESS LITIGATION PRACTICE GROUP
SEPTEMBER 2017 SEMINAR**

ROUND TABLE NOTES

Round Table Session 1

1. Mitigate Risk for use of “Cold Mountain” mark.
 - Research validity of mark
 - Reach out to other side to get time after receiving cease & desist
 - Consider taking 1st step and filing action before other side.
 - Allow forum shopping.
 - Seek mediation, if desired.

2. Hiring Screening
 - Ask up front
 - Get representations from potential hire
 - Review previous agreement, if in place
 - Courts focus on employer

3. Who will handle the suit – in-house or external?
 - Considerations:
 - Privilege.
 - Involvement of in-house counsel in facts.
 - Consensus – outside counsel vs. in-house: go with outside.
 - Weak in-house
 - Conflict between C-suite & in-house counsel
 - Questionable investigation after cease & desist letter.
 - Privilege
 - Used for extensive subject matter expertise
 - Upjohn warnings

4. Communications.
 - After all-hands meeting:
 - Retain outside counsel.
 - Retain experts.
 - Do you have a written procedure in place – who to call first?
 - Point of contact – Sally Carrera.
 - Communication to Board? Yes.

5. Who spearheads the investigation?
 - In “Bet the Company” scenario, mostly outside counsel
 - Consider whether Sally C should be in or out of internal investigation.
 - She may be a witness.

6. Cease and Desist Letter
 - Have to make business decision – shut down or continue?

- Analyze risks & costs.
- Questionable investigation.
- No response re trademark (affect product access issue or when to arrive?)
- Does that trigger a litigation hold?

7. Litigation holds

- When should you issue a hold? Possible answers:
 - When receive cease & desist letter
 - When counsel knew of furniture being bought for Blefescu minister.
 - When further information about bribe known.

Round Table Session 2

1. Early Steps.

- Are attorneys fees recoverable if we win?
 - Who is the prevailing party if multiple claims are asserted?
 - Would there be further litigation to determine reasonableness of fees?
- 1st reports.
- Litigation hold, to extent not already in place.
- Research applicable law for that jurisdiction.
- Pressure letter to opposing counsel
- Insurance notices/coverage demand.
- Disclosures/notices to governmental or other entities (lenders, e.g.)
- Undo the bribe.

2. Insurance

- Immediately explore coverage options—send notice of claim
- Address coverage concerns with insurance.
- Push for coverage, review policy, push back against carrier if needed
- Or, push to get declination letter.
- Talk with coverage counsel for expert view
- Besides insurance, are there indemnification rights in place?
- Get help securing an appropriate insurance product
- What if prevail on summary judgment against negligence claim, but intentional claim survives?
 - Continuing defense probably owed because of potential appeal.
- Respond to reservation of rights letter?
 - Depends on whether potential exposure close to/exceeds policy limits.

3. Communications: internal and external

- 3rd party inquiries – who handles?
- Engage communications control/PR firm.
 - PR professionals often look at things completely differently from lawyers—in a positive way
- Control internal message to employees

- Particularly those not in control group who are vulnerable to contact from other side
5. Litigation Hold – How broad/deep?
 - IT clearly involved.
 - Concern about what else was done w/flash drive—who else had it and used it?
 - Once hold is issued, what do you do with information?
 - Distinguish hold vs. collection
 6. Once case filed, how to investigate?
 - Identify the Players/witnesses to
 - Determine where to get documents
 - Who to interview
 - Consider the forum
 - Consider former employees
 - How deal with them?
 7. Consider at 40,000 foot view – can/should we defensively use Chap 11?
 8. FCPA
 - Limited exposure with among outside attorneys.
 - Brazil & Russian laws are also of serious concern.
 - Weighing self disclosure or not.
 - DOJ focus, & hard to get items dropped.
 - Adopt company-wide policy.
 - Provide training and certification for employer.
 - Larger companies track and train.
 - Training for external agents.
 - Survey of dealings among employees over a certain salary.
 - Dictates level of training
 - Best practices:
 - Annual in-person training.
 - Local attorney in foreign country.
 - Self-reporting if bribe already paid?
 - Law firm reviews all procedures.
 - Bribes disguised as commerce: how to recognize?
 - Same true for global business.
 - Due diligence.
 - Dealing with the other company (Lannister)
 - Should we report them?
 - Can't continue to do business with them
 - No attached invoice
 - Hogback
 - Zero training.
 - Giving business overseas, failure to train is substantial.

- With expanded overseas suppliers, higher duty.
- Hogback should have realized problem more widespread by time furniture issue arose, and done a broad investigation.
 - Call GC's office!
- Hogback Defenses
 - Lack of knowledge/rogue employee.
 - Not a safe harbor.
 - Failure to prevent bribe is problematic.
 - Bottom line: Hogback is toast.
- If faced with these kinds of efforts to coerce, seek government help to get product released.
 - Work through consulate.

Round Table Session 3 & 4

1. Jury presentation.
 - What mattered and what did not.
 - Absence of evidence showing Alten building software.
 - Lack of evidence of development and production of skates by Alten.
 - Absence of objective empirical demonstration of
 - The trade secret.
 - Comparison with what was supposedly given to Hogback.
 - A necessity of reduction to the lowest common denominator:
 - Hogback's simple analysis of the NDA.
 - Remarkable and disconcerting logical flip:
 - Juror's belief that Hogback "must have done something wrong" because it asked Adler about whether there was an NDA.
 - Reflects juror's belief that Hogback knew there was something nefarious.
 - Turned a positive into a negative.
 - So, how *does* Hogback respond to that type of approach?
 - Surprised jury did not think there was a trade secret.
 - Counsel should have stressed existence of TS more before "reasonable efforts taken" issue.
 - Where were Hogback's detailed independent drawings?
 - Stress absence.
 - The "bully's" position dictated the outcome.
 - Very much an engineer.
 - Decision maker – either way, will sway jury.
 - Should you rely on stereotypes in voir dire?
 - Pro-NDA?
 - Rule follower.
 - Very literal – "defect" in engineering sense vs. "defect" in legal sense.
 - Anti-NDA
 - Employer doesn't own ideas.

2. Post-mortem issues.
- Don't let it get to jury in the first place? Unknown/unpredictable.
 - If lose trial, how much precedent does it create for future cases/demands?
 - Frequency:
 - One table: no specific procedure in place.
 - Second table: do them all the time.
 - Third table: done all the time in certain industries.
 - Topics to discuss:
 - What went right/what went wrong.
 - Change problematic procedures.
 - Ask outside counsel: what could we have done better?
 - Assignment of blame.
 - Reputational risk – depends on facts; determine on case-by-case basis
 - Tighten up relationship with customers.
 - Documents
 - Protective order often in place.
 - May have post lawsuit obligations.
 - Have document retention policy.
 - Including to allow you to look back in the event that there is a recurring set of events, or a similar issue comes up.
 - Examine budgets for litigation, based on experience.
 - Serial filers:
 - Can't keep paying nuisance settlements.
 - Makes you an attractive target for future lawsuits.
 - Pick the right case and venue to challenge.
 - Insurer's perspective – too many settlements = giving adjusters the "power to lose;" not good for morale.