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Trench Warfare
How To Fight and Win in the Courtroom

By Neil S. Ende

Litigation.

The mere mention of the word often is enough to wobble the knees of even the most experienced and hardened telecommunications executives. Even most in-house counsel dread the very thought of litigating with a major telecommunications carrier. But, fear not-while telecommunications litigation can be painful and expensive, when the battle must be fought, you can protect and secure your rights.

There is an axiom among litigators that most litigation is won or lost long before you get to the courthouse. Absolutely true. Indeed, litigation, much like disease, is often preventable. Businesses that observe healthy business practices tend to be infected less frequently. However, the litigation bug can infect even the healthiest businesses. The seriousness of the litigation infection often can be a byproduct of the speed and effectiveness of your response. The following are a few tips and reminders for establishing and operating a healthy telecommunications enterprise that can bring or defend a litigation in a timely and effective manner. This is followed by a discussion of when and how to commence a litigation or how to respond promptly and effectively if you are on the receiving end of a lawsuit.

Laying a Good Foundation

Like most things in life, litigation is often the result of a series of missteps, misunderstandings and/or miscalculations occurring over an extended time. Litigation can be avoided completely if care is taken to think through the way in which you structure and run your business. Here are several critical steps that should be taken to establish a good foundation:

Establish a proper operating structure. Unfortunately, when most telecom businesses open their doors, they either take no steps to form an operating entity or have their general counsel or accountant set up a corporation through which all business transactions are handled. Do not make this mistake. Take the time to think through the best organizational structure for your company. The primary choices you should consider include a partnership, corporation or limited liability company. Keep in mind, if you operate the business without the protection of a separate operating entity, you may open yourself up to personal liability for the entity's obligations and debts.

Obtain required regulatory approvals. Once you have established the operating entity, the next step for most telecommunications entities is to secure the necessary regulatory approvals (for example, certifications, tariffs or foreign corporation certificates). Depending on the nature of

your business, these can include federal, state and sometimes even local approvals. Remember, in those states that require approvals, you cannot start selling service until after the approval is granted. The failure to secure required regulatory approvals not only subjects you to enforcement actions by regulatory authorities, but also may limit your ability to enforce your agreements in litigation.

Execute clear and complete agreements. With your company established and your regulatory approvals in place, now is the time to negotiate and execute your carrier and/or customer agreements. Don't operate on a handshake and don't just sign the agreement that is put in front of you. Not surprisingly, that agreement was not drafted to protect your interests and likely does not address your legitimate concerns. Moreover, most agreements are very poorly drafted and do not properly or clearly address key issues. Even if your carrier or customer has the best of intentions, their agreements almost always will need to be clarified and/or tailored to the specific terms of your business arrangement. Keep in mind that at least as many disputes and subsequent litigation are the result of avoidable misunderstandings about the terms of an agreement as from intentional wrongdoing by a party.

Here are a few tips: *Insist on written agreements*. Read your agreements thoroughly. Take the time to think through and to review the terms of your agreements with qualified telecommunications counsel. For example, does the agreement clearly set forth all rates and charges? Does it indicate if, when and under what circumstances these rates and charges can be changed? Does the agreement detail required payment terms and how charges are to be disputed? What are the dispute resolution mechanisms, and are the rates subject to tariff changes? (See the article, "Unholy Contract: TheLegacy and Abuse of the Filed Rate Doctrine," PHONE+, May 1999.) The list of issues is long and hidden minefields can turn the best agreements into potential disasters. (Some of these issues are discussed in the article, "Carrier Contracts: A Minefield of Avoidable Risk," PHONE+, August 1999.) The point is that your agreements need to address clearly all key terms and conditions of your business transactions. Even the best litigation counsel often cannot repair the damage done by the client who signs an agreement that is incomplete, unclear or contains one-sided terms and conditions.

Operate your business in a manner consistent with your agreements. Surprising as it may seem, many telecom companies sign agreements that impose certain specific obligations on them or grant them certain rights, but then completely fail to implement operating procedures that take account of those obligations or rights. For example, if you are a provider of services, do you have the systems in place to produce and send bills in a timely manner? Or, if you are a customer, do you have the systems and personnel in place to review the bills you receive and to issue disputes as required? The simple message: Make sure your contracting and operations personnel interact regularly to ensure that your business systems are in sync with your contract rights and obligations.

Maintain complete written records. In the litigation world, the written word is king. For example, most telecom contracts require written notice of dispute and termination. Be sure that you understand and comply with each of those requirements. Of equal importance, however, are good written records establishing the key elements of your business relationship. Thus, service orders always should be in writing. Key discussions with your suppliers and customers should be

memorialized in writing (either through confirming letter or internal memorandum) as they occur. Financial books and records should be maintained on a current basis by qualified bookkeeping and/or accounting personnel. In short, your ability to prove your case in court often is dependent on the quality of your written records. Company operating procedures should be written with this in mind and your key employees need to understand the importance of strict adherence to these operating procedures.

The Litigation Phase: A Procedural Primer

Telecom litigation typically occurs in one of three forums: a state court, a federal court or an arbitration tribunal. Subject to the venue term of the agreement, the party bringing the action has the first right of choice; that is, he or she selects the forum in which the complaint is filed. As defendant, you may have the right to challenge the forum or even the absolute right to move the case to a different forum. For example, if the matters in dispute involve issues of federal law (such as interstate or international telecommunications services), then a defendant has the absolute right to move the case from a state court to a federal court. This may be an important issue if you are a defendant in a potentially unfriendly state.

Many telecom contracts contain terms requiring the parties to submit their disputes to arbitration. Some of these terms specify the arbitration authority (for example, the American Arbitration Association) and the location. As a general matter, the courts will enforce arbitration agreements, so before signing an agreement you need to be certain that you are willing to arbitrate before the specified authority and in the specified location.

In making this decision, keep the following in mind:

- You may not have the same legal rights in an arbitration proceeding as you would in court (for example, your rights to obtain documents and/or witnesses may be more limited and the time to present your case may be limited);
- You may not have the right to a written decision;
- Your appeals rights are virtually nonexistent;
- In some instances, the arbitration authority may be under contract with your opponent in the arbitration; and
- It is extremely inconvenient and expensive to arbitrate in a distant location.

You should understand and consider each of these issues before agreeing to an arbitration clause.

Regardless of the forum, most telecom litigations proceed through several phases. First, one party (the plaintiff) will file a complaint setting forth each of its claims and the relief it seeks. Subject to a number of factors, the other party (defendant) normally has about 30 days to answer and assert its defenses and its counterclaims (that is, its claims against the plaintiff). The defendant also may move to dismiss the complaint at this time.

Once this phase is completed, the parties move into what is called the discovery phase. This is where each party has the right (subject to any limitation in the applicable arbitration rules) to obtain documents and written answers to questions from the other side. Depositions also may be taken during this period.

When discovery is completed, the parties move into the pretrial phase. Here, the parties normally have the right (and/or obligation) to file pretrial motions. These motions can include motions for summary judgment and the like, in which a party seeks a ruling by the judge or arbitrator that it is entitled to a judgment in its favor as a matter of law, without a trial.

The pretrial phase is followed by the trial and the issuance of a judgment in favor of a party. In some cases, the court or arbitration panel will decide both the issue of liability and the issue of damages together. In other cases, there will be a separate minitrial on the damages issue following the conclusion of the liability phase.

Finally, once the trial is completed and judgment(s) has (have) been rendered, appeals may be taken. If the matter was heard by a state or federal court, appeal is a matter of right. If the matter was heard by an arbitration authority, there normally is no right of appeal. You may, under very limited circumstances, have the right to have the arbitration judgment and/or award vacated.

Litigation is war. The stakes are high and the costs are high. It is not for the fainthearted or for those who do not have the resources to seeit through. The large carriers, in particular, play hardball and, quite frankly, much of the law is on their side. Thus, if you are thinking about filing suit, or if you are on the receiving end of a lawsuit, you should consider the following points before proceeding:

Hire qualified telecom counsel. Telecom litigation is particularly complicated because of the interplay of state and federal law and related issues. Most lawyers simply do not have the knowledge or experience to address these issues properly. Unfortunately, given the state of the law, the result is often disaster for the reseller. The simple answer is you need to hire counsel that has experience in trying multiple telecom cases. If your case is in federal court, be sure that your counsel has tried telecom cases in federal court. If you are before an arbitration authority, be certain that your counsel has been involved in telecom arbitrations in front of that arbitration authority. For the same reason you don't hire a dentist to perform heart surgery, you shouldn't hire a general attorney to litigate a telecom case. Rest assured, however, qualified telecom counsel effectively can protect and secure your rights.

Make the commitment. The journey through telecom litigation is a marathon, not a sprint. Success is gained by those who know the track and have the focus to stay the course. Litigation will sap your resources, time, money and emotional energy. Thus, you should not enter the race unless and until you have made the commitment to see it through.

Set realistic goals. Even in the best of circumstances, litigation is a crapshoot. You win cases you should lose and you lose cases you should win. Thus, you should never enter litigation with the expectation of a certain win or a certain recovery of substantial damages. Judges and juries

are comprised of fallible human beings and even under the best of circumstances, success is by no means certain.

Establish a budget. Litigation can be expensive. Working with your counsel, you need to set a realistic preliminary budget that takes into account a realistic evaluation of the quality of your case and the damages you can expect to recover. Keep in mind that the preliminary budget is merely an educated assessment and may be subject to revision as the case progresses. Also, keep in mind that a litigation, like a marathon, has its ebbs and flows. The front runner often ends up coming in last. Thus, it also is critical to maintain your emotional equilibrium and your budgetary discipline.

Stay involved. Although your counsel will review and learn the facts, the best clients are those who stay involved in their litigation and who are never afraid to share ideas and theories.

In short, although telecom litigation always will be painful and expensive, effective preparation will make it possible for you to protect your rights.

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