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INSIDE OUT

H

OW DO YOU HELP CLIENTS ASSESS RISK?

Martini: There are several important steps in helping a client assess risk. First, since risk needs to be examined within the construct of a particular circumstance, you need to begin by properly defining the situation. You also need to understand the different facets of the issue, what the legal ramifications are and the business considerations at hand. This includes having a deep understanding of what the business ultimately wants to accomplish and how those plans and desires may be at odds with the path of minimal risk for the company. You must also understand the level of risk the client is willing to take.

Ultimately, you need to help the client decide how to balance the trade-offs between accomplishing the business' goals and mitigating risk. I think of reaching this balance as tuning a radio and dialing it up or down depending on what the client's risk tolerance is.

Susler: As we often say, it starts with a conversation with the client. I need to understand as much as I can about the business matter at issue, what our goals are, where the potential problems lie. Is the business at issue part of our strategic goals as a company or just a one-off opportunity? It is also important to understand who the players and stakeholders are internally with my client and to understand their appetite for risk generally and with this particular matter.

Additionally, I need to understand who is on the other side of the deal. Are they a key customer? How are they to work with? Do we have a positive or problematic history with them? Are they a financially viable entity? I ask these and other questions, then analyze that information with my mix of legal and business knowledge and practical experience, keeping in mind that the goal is to keep business flowing, not to prevent it.

WHAT MAKES ASSESSING RISK SO DIFFICULT?

Martini: Often, certain aspects of a client's circumstances will make it difficult to assess risk. This includes, for example, when the situation is moving and changing quickly and it is hard to know exactly where things stand at any given moment. Furthermore, when a lot is at stake with a decision, it can often lead to key stakeholders waffling, which can make it more difficult to reach a decision. Having a lot on the line can also make it hard to determine who the ultimate decision-makers are. Also, if there are a number of unknowns in the situation, or



RISKY BUSINESS

Helping clients assess risk

By CHRISTINA L. MARTINI and DAVID G. SUSLER

if the client's risk tolerance keeps shifting, it can also make it difficult to reach a decision.

Susler: I agree and would add that sometimes it can be a challenge getting the client to understand both the business risks and the legal risks. Difficulty also often lies in not having all of the facts and simply not having control of all outcomes. Another factor is quieting — as in dialing down, not turning off — the lawyer's typically risk-averse thought process.

WHAT ARE SOME TIPS ABOUT HOW BEST TO ASSIST CLIENTS WITH ANALYZING RISK?

Martini: There are a number of things that you can do to help your clients properly analyze risk. First, you and your client should be as fluid as possible with the decision-making process and understand that you are in a dynamic environment and circumstances may change a lot during the process. You need to make sure that you are working with the right person at your client's organization who has the ultimate authority to make the decision or who at least has direct access to those people. Second, seek out the information and people you need to best help your client make a decision that is consistent with its risk tolerance in this situation and be sure that you fully understand what that risk tolerance is. You also need to understand the potential ripple effects of the risk presented and what

the ultimate decision will be and what impact they can have on various aspects of the client's business. Finally, you need to be prepared and expect the unexpected and allow some wiggle room in the process just in case it happens.

Susler: One of my favorite tools is asking my business client to tell me how a particular risk might arise in the matter at hand. For example, if we are analyzing a warranty or indemnity clause, I like to brainstorm with my sales or manufacturing team about how a breach might occur and what it would look like in the real world. I can then take their expertise in day-to-day operations, compare it to the legal mandates of the contract in question and together we can assess how likely those triggers are to occur and use that to determine whether we are comfortable with the risk. CL

Christina L. Martini is a practicing attorney, author and columnist. She focuses on domestic and international trademark, copyright, domain name, internet, advertising and unfair competition law.

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To submit a question for future columns, e-mail questions.insideout@gmail.com