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Corporate Counsel
HOUSTON

Managing Litigation Risks and Costs:

Internal controls, legal updates (attorney fees and the TCPA),
and recent ethics opinions

October 23, 2019





Agenda

- 1 Internal Controls - Your company culture on trial

- 2 Recent Updates: Attorney's fees and the TCPA

- 3 Talking to the Media – Ethics opinion

- 4 Client Files – Ethics opinion (clarification)

Internal controls – Your company culture on trial

- How does it happen?

- What can you do to be prepared?

Internal controls on trial

- Financial Controls (SOX)
 - Quarterly certifications
 - Who follows up and how?
 - Communications between departments
 - Finance, internal audit, legal
- On trial.
 - Materiality.
 - Disclosing lawsuits in public filings?

Internal controls on trial

Internal audit controls

- Basic procedures in place
 - Effectiveness
- Audit follow ups
- Right mentality – awareness of potential issues (e.g., fraud)
- Conflicts of interest – trip wires

Internal controls on trial

- Codes of Conduct
 - What are they
 - What is needed vs. required
- Sentencing guidelines
 - Civil penalties
- COSO



Internal controls on trial

- Code of Conduct / Compliance on trial
 - Company culture
 - Staff qualifications
 - Budget
 - Training
 - Can and will be used against you in court.

Internal controls on trial

- An ethical Code of Conduct
 - Not just words on paper.
- Protecting the COC
 - Compliance officer
 - Training
 - “Tone at the top”
- Who will testify at trial to defend the company’s code of conduct?
- Knowledge throughout company.
- Signoffs - **Best

Internal controls on trial

Inventory and asset controls

- Basic procedures in place
 - Vendor selection/approval
 - Inventory controls
 - Controlling assets (scrap, valves, etc.)

Internal controls on trial

- In house counsel's role?
 - Put your house in order.
 - Executives, conflicts, behaviors, culture
- Red flags?
 - Airplanes
 - Boats
 - Spending money
 - Isolated systems / procedures
 - Newly acquired business units
- Pre-acquisition litigation
- Family controls
- “BS bumrush”
- vague responses to inquiries
- Weak managers over strong/suspect people
- Weak internal audit
- Not asking direct questions
- Geographics – Location and culture (e.g., “the Louisiana way”)

Attorney's fees update - Rohrmoos

- Tenant (dialysis center) gets negative reviews from state health inspectors for loose tiles, wet floors due to foundation issues.
 - Tenant terminates lease and sues for breach of lease and of warranty of suitability but not for damages. Landlord counterclaims for breach of lease.
- Judgment on jury verdict: (1) landlord materially **breached the lease first** and breached implied warranty of suitability; (2) tenant had **right to terminate based on such breaches**; and (3) tenant awarded attorney's fees of \$1.025 mm.
- Appeal issues: (1) whether evidence supported warranty claim; (2) whether tenant may terminate lease for prior material breach of lease; (3) attorney's fee award entitlement and sufficiency of the evidence.

Attorney's fees update - Rohrmoos

(1) Whether tenant/defendant was entitled to attorney's fees as a prevailing party; and

(2) Whether sufficient evidence supported the fee award.

Attorney's fees update - Rohrmoos

Issue 1 -- "Prevailing party"

***In contractual fee-shifting case, the contract language controls who the prevailing party is.

Here, the contract stated: “

- “In any action to enforce the terms of the Lease, the prevailing party shall be entitled to an award for its reasonable attorneys’ fees.”
- Held: Tenant a prevailing party bc it “successfully defended against [landlord’s] breach of contract counterclaim” and secured a take-nothing judgment on that claim.

NOTE: This is different from CPRC 38.001, which requires:

- (1) prevail on a fee-shifting cause of action; and
- (2) recover damages.

Attorney's fees update - Rohrmoos

Issue 2 -- Sufficient evidence of fees?

- Case evidence: Attorney testimony only (i.e., no billing statements)
 - 20 years
 - Rate \$420 (“I know it sounds ridiculously high ... but it pays for the logistics of running a law firm.”)
 - A reasonable amount of hours would be 750-1000. But **this case has not been worked up in a reasonable fashion**, so fees should be \$800,000 (“I will be the first to admit, that is a ridiculous number. [The fees] should never have gotten that high.”)
 - Searched millions of emails /produced lots of hard copy docs (7000 pages) / more than 40 depositions
 - “4 or 5 motions to compel / 40-page msj response plus hearing / respond to all of the designated experts
 - **“the costs got way out of control here and the fees were not reasonable or necessary.”**

Attorney's fees update - Rohrmoos

- Prior holdings:
 - Arthur Anderson – the factors
 - El Apple – Introduction of Lodestar method to Texas
 - Montano – Lodestar method is presumptively reasonable
 - Long – Lodestar method requires specific task times
- Holding: Lodestar is “short hand” for Arthur Anderson factors. Lode Star is now exclusive method to determine reasonable, necessary fees. Two steps:
 - (1) Lodestar; (reasonable hours) x (reasonable rate/hr)
 - Presumptively reasonable
 - (2) Enhance or reduce on “relevant consideration”
 - But what are those? not Arthur Anderson factors?

Attorney's fees update – Rohrmoos FN 10

- “We recognize that when fee agreements provide for arrangements other than hourly billing, the attorney will not be able to present evidence of a particular hourly rate billed or paid for services performed. In those instances, the fee claimant, through its expert, has the burden of showing that the rate claimed for the purposes of the lodestar calculation reflects a reasonable market rate given considerations in *Arthur Anderson*, including”
 - attorney expertise / novelty, complexity involved / special skills required / risk (contingency)
 - “any other considerations” that would factor into fee negotiations if the attorney were to bill hourly.
– **What considerations?**
- “In this way, the contingent nature of a fee agreement, or the nature of an alternative fee agreement, is taken into account in calculating the presumptively reasonable fee in the first step ... prior to adjustments for factors not yet considered.” – **Wait, now we are talking about what factors?**

Attorney's fees update – Rohrmoos (Duh!)

- Contractual fee shifting –
 - Contract language controls.
 - A defendant can be a prevailing party.
 - A claimant does not have to obtain a judgment for damages to be considered a prevailing party for fee-shifting purposes
- Lodestar = Arthur Anderson = Exclusive way to prove shifting fees.
 - Reasonable hrs x reasonable rate = Reasonable fees
(“Duh.” – Billie Eilish)
 - Can be adjusted up or down based on “other considerations: not included in lodestar – But we are not sure what those other considerations are.
- **AND** (in case you missed it):

Attorney's fees update – Rohrmoos

NEVER TESTIFY THAT YOUR OWN ATTORNEY FEES ARE NOT REASONABLE.



-- Billie Eilish, Bad Guy

Client files and talking to the media – 2019 ethics opinions

- **Opinion 683:** Does a lawyer violate the Texas Disciplinary Rules of Professional Conduct by making statements to the news media about a case pending on appeal when the lawyer criticizes the opponent’s litigation tactics and reiterates the misconduct alleged in the underlying complaint?
- TDRPC 307(a) - ...a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication ... that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding.
- TDRPC 307(b) - certain categories of statements “ordinarily” violate the Rule, including those that refer to “the character, credibility, [or] reputation” of a party.”

Ethics violation?

Client files and talking to the media – 2019 ethics opinions

- No – Timing matters
- “In short, the likelihood of a lawyer’s statements “materially prejudicing” a proceeding on appeal is, as a general matter, fairly low.”
- Comment 1 to Rule 3.07 - the likelihood of material prejudice is highest where trial by jury is involved.
- “A lawyer describing the general nature of the defense without elaboration need fear no discipline, even if he comments on the character, credibility, reputation or criminal record of a witness.” *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); see also TDRPC 3.07(c).

Client files and talking to the media – 2019 ethics opinions

- **Opinion 684 (Clarification):** May a lawyer, who is departing a law firm, take the firm's only copy of client files in which the lawyer personally represented the clients and delete client files, documents, or data from the firm's electronic document repository and devices without approval of the law firm?
- 2018 Opinion 670 – a lawyer may take a copy of client files when departing a law firm without the firm's consent.
- A departing lawyer may not, however, take the only copy of the client files and delete the firm's copy of the files. No opinion on whether this conduct = theft.
- The firm may retain a copy of the client's file and is required to keep certain company files (i.e., client trust account information). Not even the client can direct the firm to delete the only copy of the firm's files even though the client may demand its original file back.

TCPA (HB2730) – New limitations, new exemptions

- Why? “overly broad and confusing”
- Four categories of revisions:
 - narrowing definitions
 - increasing number of objections
 - broad protections for media
 - new procedures
- Definitions:
 - Exercise of right of association
 - New law: must relate to joint pursuits regarding a governmental proceeding or matter of public concern.
 - Old law: virtually any communication between 2 persons was covered.

TCPA (HB2730) – New limitations, new exemptions

- Definitions cont'd:
 - “Exercise of right of association”
 - New law: must relate to joint pursuits regarding a governmental proceeding or matter of public concern.
 - Old law: virtually any communication between 2 persons was covered.
 - “Legal action” – now includes dec actions. Procedural motions, alternative dispute proceedings, and post-judgment matters not covered.
 - “matter of public concern” – BIGGEST CHANGE
 - New law: communications regarding (1) public figures and officials; (2) political, social, or other interests to the community; and (3) subjects of concern to the public.

TCPA (HB2730) – New limitations, new exemptions

- Definitions cont'd:
 - “matter of public concern” – **BIGGEST CHANGE**
 - New law: communications regarding (1) public figures and officials; (2) political, social, or other interests to the community; and (3) subjects of concern to the public.
 - Look to factors set forth in
 - *Snyder v Phelps*, 562 U.S. 443 (2011)
 - *FilmOn.com v. DoubleVerify*, S244157 (Cal. 2019)

TCPA (HB2730) – New limitations, new exemptions

- Definitions cont'd:
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TCPA (HB2730) – New limitations, new exemptions

- Additional exemptions: 11 total, including disputes involving:
 - Misappropriation of trade secrets or corporate opportunities
 - Non-compete and non-disparagement agreements
 - Family law
 - DTPA (Chapter 17 Business and Commerce Code)
 - State Bar disciplinary actions
 - Government employee whistleblowers
 - Common law fraud

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