

Legal Issues of Doing Business in the US

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1. INTRODUCTION

- 1.1 Traffic accident litigation survey: 3.42% are litigated in New York v. 0.15% in Tokyo, 30 times difference.
- 1.2 Lawyers - CA - 135,737 lawyers (2000) for 34,336,000 California - 1:253; L.A. 23,000:9,884,300 - 1:430.
- 1.3 Complex legal system - Federal System: Federal, state, local laws - French & Spanish influence.
- 1.4 Lack of clear norms and values: Multi-ethnic.

2. THE LAW BUSINESS

- 2.1 Multi-billion dollar business - only hospitals, doctors, the film industry, and the computer industry earned more.
- 2.2 Service business - low revenue, high margin.
- 2.3 Knowledge intensive - constant change, new law everyday, needs constant updating
- 2.4 Creative process - lawyers are writers, orators, actors, and strategist, but requires strong discipline.

3. COST SAVING

- 3.1 Right lawyer - experienced lawyers that update constantly.
- 3.2 Technology - network, email, forms & boiler plates.
- 3.3 Proper staffing - experienced high cost lawyer with less experienced low cost personnel.
- 3.4 Communications cost - expensive - organize and think through before talking or providing documents, don't put lawyers on hold - can cost \$5/minute.
- 3.5 Fee structure - time & cost, flat fee, contingency fees, partial contingency, additional bonus, hybrid.
- 3.6 Time - ultimately what a lawyer is selling.

- 3.7 Results - short term (close deal) & long term (dispute & litigation).

4. U.S. LITIGATION

- 4.1 Greatest American past time.
- 4.2 High risk: uncertainty in law and performance + high legal cost + huge awards
- 4.3 Winner does not get legal fees as a general rule, but increasingly likely, esp. in IP cases.
- 4.4 Discovery long drawn out - a harassment device & high cost.
- 4.5 Allows recovery for pain & suffering, consequential and punitive damages.
- 4.6 STRATEGY:

- Decide whether to settle and if so, settle immediately.

- Decide how to litigate early on.

5. AVOID PERSONAL LIABILITY

5.1 Shareholders' liability

- Alter Ego:

- Under-capitalization.

- Segregate personal from corporate affairs, or one company with another.

- Observe corporate formalities.

- Majority's duty to minority shareholders.

5.2 Officers' & Directors' Liability

- Duty of care:

- exercise care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

- exculpable in articles, except for 7 deadly sins.

- right to rely on information from others in good faith.

- Duty of loyalty:

- conflicts

- insider transactions, esp. loans

- obtain approval of other directors (loan - could be liable jointly) and shareholders

- not exculpable

- Common areas of exposure

- issuing and trading in securities

- improper distribution

- insider transactions

discrimination

- antitrust - price fixing and price

- employment practices & worker safety

- nonpayment of withheld taxes

sharing plan

- administration of pension or profit

- merger & acquisition

5.3 Spousal liability - community property

6. BANKRUPTCY

6.1 Ch 11 - Automatic stay of unexpired agreements

6.2 Spousal liability - community property

6.3 Preferential transfers - transfer of any interest of debtor in property for an antecedent debt owed by the debtor before such transfer was made for the benefit of a creditor while insolvent, not in ordinary course of business - 90 days or if insider 1 year.

6.4 Fraudulent transfers - U.S.: within 1 year prior to the bankruptcy filing with intent (actual or construction) to defraud creditor. But state laws: even 7 years.

6.5 Key Non-dischargeable debts

- Tax for the last 3 years

- Debts obtained through fraud

-Willful or malicious injury - copyright

7. COLLECTION

7.1 Very strong consumer protection law.

7.2 Counterclaims.

7.3 Time is of the essence.

7.4 Build in clause requiring debtor to pay collection cost and interest.

7.5 Collateral (including goods just sold) & personal guaranty.

8. PRODUCTS LIABILITY

8.1 High jury awards: Pain and suffering, punitive damages.

8.2 Jury system tends to be sympathetic to the plaintiff, esp., against foreigners.

8.3 Careful review of advertisement, brochures, and user manuals for proper representations and clarity (also to cover false advertising).

8.4 Design safety into the products.

8.5 Use proper disclaimers, limitation of warranty, and limitation of liability.

8.6 Isolate foreign holding company from liability and harassment.

9. TRADEMARK

Intent to use registration.

10. COPYRIGHT

Work for hire.

11. PATENT

Must file in U.S. within 1 year of first public disclosure and file in Taiwan and Korea before any public disclosure (no 1 year grace period).

12. TRADE SECRETS

Protects customer list, source code, etc., but must implement procedures.

13. UNFAIR COMPETITION

"Unlawful, unfair or fraudulent business practice and unfair, untrue, or misleading advertising " - what is unfair in California may be quite fair in a different culture.

14. CUSTOMS

14.1 Confidentiality - advantage to competitors

14.2 Customs will seize goods infringing on U.S. trademark & copyright.

14.3 Export control.

15. FOREIGN OWNERSHIP REGULATIONS

15.1 Exon Florio - Treasury Department,

15.2 International Investment & Trade in Services Survey Act -Commerce.

16. PREVENTIVE LAW

16.1 Be knowledgeable of legal consequences.

16.2 Always keep an eye on litigation from day ONE.

16.3 Use legal forms to build in protection when buying, selling, hiring, firing, etc.

16.4 Built in recovery for legal fees and arbitration.