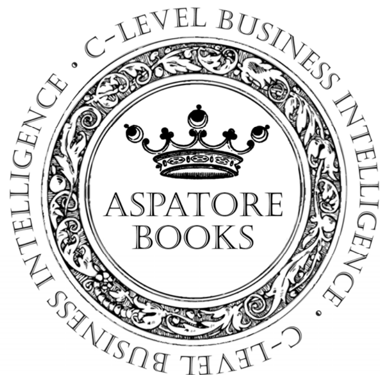
INSIDE THE MINDS

# Technology Law Client Strategies

*Leading Lawyers on Strategizing for Cases, Resolving Disputes, and Effectively Working with Clients*



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# Advising, Counseling, and Representing Clients in Technology Disputes

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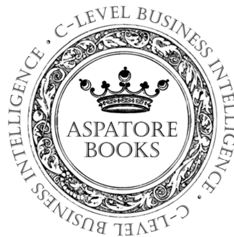

## My Role as a Technology Lawyer

My focus within technology law is in litigation and trial work. Ninety percent of my job involves either litigating a case (in court or at arbitration) or trying to resolve an ongoing dispute between two technology companies; the remaining 10 percent is pre-litigation advice and counseling. My practice area is primarily in commercial type disputes, so my cases typically center around a contract. Much of what I do relates to hardware and software projects, where I will represent either the vendor that has sold or the customer that has purchased a piece of hardware or software. Additionally, I also do soft IP, i.e., trademark and copyright, litigation.

When a client calls me to get involved in a technology dispute, my first order of business is to try to "think outside the [standard litigation] box" and find a creative, amicable resolution before one of the parties files a complaint in court or initiates an arbitration. In this way, I like to think that my work enhances the technology industry by enabling the two companies to get back to the business of innovation. For example, if I am representing a vendor that is developing software, creating new versions of software, or trying to implement software for customers, litigation takes time away from the business of growing their company and improving and selling their product. A great deal of time is spent looking for documents, giving depositions, conducting interviews, responding to discovery, dealing with strategy decisions, and the like. The most important value that I provide is in getting the dispute off the client's plate as quickly as possible so they can go back to business as usual.

## A Valuable Client Resource

At the beginning of every dispute, I try to sit down with the client, ideally in person, to figure out their goals and expectations. I work with them to formulate the best strategy to achieve these goals as quickly and as inexpensively as possible. Other counsel take a different approach, telling the client that they must spend $X and litigate for a minimum of twelve to eighteen months before they even can think about trying to resolve the dispute with the other side. I have encountered that situation before. However, what I try to do at the beginning is figure out what the client ultimately wants and see if there is any way we can shortcut to that end

result without putting them through the time, expense, and disruption of litigation, which requires a substantial monetary and time commitment.

## Client Trouble Areas

The biggest mistake that clients make is to try to handle a brewing dispute by themselves for too long before engaging counsel. This is true with companies that have in-house counsel and those that don't. Many vendors take the view that if the dispute is with a customer, they want to resolve it without lawyer involvement, because they want to have a good relationship with this customer for years in the future. It is easy to understand why companies make this mistake, because many of them are afraid that, aside from the expense, once they engage counsel, the other side will become defensive and dig in their heels. However, if they end up going too far down that path unrepresented, they often will say things that become juicy sound bites or hot button issues once the case inevitably proceeds to litigation, whereas, if they had engaged counsel earlier, they could have potentially avoided creating or exposing that kind of bad evidence.

In my experience, if counsel are engaged early, then it actually can streamline the process. What happens in many of these cases is if it gets to the stage where some bad blood already has percolated up to the surface between the two companies, they tend not to think as rationally and deal as objectively with each other as two detached counselors would, thus potentially making nasty litigation inevitable. Outside counsel ideally will be focused on trying to find a productive solution instead of going through a long litigation, and the problem may be solved much more quickly and cheaply.

Also, counsel's experience in the particular area of dispute can be invaluable. In-house counsel certainly know their company's business, and may even know the ins and outs of litigation, but they might not have had experience with the particular type of dispute presented. In addition, they may not approach the problem as objectively as outside counsel would. If in-house counsel try to handle the matter on their own, oftentimes they can get into the kinds of problems that would otherwise be avoided by hiring counsel who are well versed in technology litigation.

## Helpful Lawyering Strategies

As stated above, my strategy is to meet with the client as early as possible and figure out exactly what they want. I try to think creatively in terms of how to achieve the client's ultimate goal in the most efficient manner possible while at the same time avoiding their undesired outcomes. Many times, you are presented with a seemingly straightforward dispute, like a product that isn't working, but often other factors come into play in terms of PR considerations or reputation in the marketplace. The client or the opposing side might have other interests going forward besides the dollar value at stake in that particular dispute. It's best to try to figure out early on these different factors that might come into play down the road and the best way to implement a strategy to make sure those goals are achieved. I try to understand the entirety of the client's business, not only what they are doing currently but also where they started from and where they intend to be in the short and long term. Sometimes litigating a dispute all the way to the end might enhance that goal, and other times it might detract from it. Therefore, focusing solely on which party should be liable for damages to the other doesn't always get clients where they want to be, and thinking outside the box is crucial. Also, clients really appreciate it if you understand their business and what they want to do in the marketplace going forward.

## Staying Current

In order to stay on top of industry developments, I read a lot of different technology periodicals, both on and offline. Mostly, I try to follow the news on my current clients, as well as those I would like to have, and figure out what they are doing, where they are going, and where they want to go in their own business. Understanding these things can help you advise clients when a dispute arises. Most helpful to me are the multiple daily news updates that I receive by e-mail from technology news related services.

## First Steps

When first starting a case, I will go to the client's Web site to see how they advertise themselves to the public. For example, if it's a vendor that has a software product and they are making claims about what the product can do, you want to be able to understand what the product does and how it's

supposed to work and what promises are made to the general public. This will help you to determine whether the client is delivering on those promises. The other thing I will do is some digging around for public information on the opponent to attempt to determine how it would be using the client/vendor's product. Before I meet with the client, I will ask them to send me all the materials they have concerning the dispute. I try to figure out what was said between the client and the opponent before the relationship was formalized by a contract. Many times, promises are made in those communications, and this may bring to light the two companies' expectations of the relationship or the products at issue.

In the first meeting with the client, as stated, it is important to find out what the client hopes to achieve coming out of the dispute and then even more specifically how they want to get to that point. Litigation is often driven by tolerance for risk. If a company is very risk adverse, then that will affect the strategy going into litigation or pre-litigation settlement negotiations. If a company is risk tolerant, then you will be more comfortable taking aggressive positions with the opposing party at the outset, because the client is not afraid to litigate. Also, you have to figure out what it is they are willing to spend, which can affect the positions taken in litigation, and even whether the case is litigated at all. However, obtaining information about the client's financial position can be a sensitive task, because you don't want to get off on the wrong foot with a client by insinuating that they are not solvent enough, and thus not enough of a "player," to litigate, but it's something you need to know in order to advise them.

If a client comes to me and says they don't care what it costs and that they are willing to outspend the other side, or on the flip side, if they say that they are in a difficult patch and trying to weather the storm until their business turns around, both of these scenarios will affect how you approach litigation. If once you get into a case the client doesn't have the money to spend, then that puts them in a weak position. A few weeks ago, a client decided not to go forward with litigation because once the train left the station, he didn't have enough money to keep fueling it to get it to his desired destination. The effect of this decision was that the client let go an opportunity to collect damages but freed itself to focus on continuing to build its business.

## Educating the Company

The education process is critical, particularly for a company that has not been engaged in a big litigation matter before. In that situation, you have to give the client a road map of what litigation can look like and present them with the best and worst-case scenarios. If you are defending a company in a claim, you have to tell them not only what their ultimate damages would be, but also the costs of litigation, that they potentially could be forced to pay their opponent's attorneys' fees (depending on the contract or relevant law of the jurisdiction) if they lose, the imposition on the management team and others at the company, and the possible public relations effect. For example, if you are representing a company that has a software product and is being sued by someone that says it's not working, do they want to run the risk of taking that all the way to trial and losing? That could potentially affect the company's reputation in the marketplace and negatively impact future sales. Some companies might say that they are totally confident that their product works, and that they have X number of customers and this issue is their first complaint. They aren't concerned that the issue at hand will negatively impact their reputation. Others might say that the subject of the dispute is a new product for them and the cornerstone of what their company is going to be for the next ten years, such that they can't afford any negative publicity. These risk tolerance factors have to be considered in advising the client how to resolve the dispute.

## Understanding Litigation

At the outset, I do everything I can so that the client understands as fully as possible what they would be getting into if their dispute goes to all-out litigation, so that they can make an informed decision on how they want to go forward. The bottom line is when clients come to me, I have a duty to advise them about what litigation means in terms of expense, time, disruption, PR, and the like.

## Choosing an Approach

The approach to a case generally varies based on the clients' goals. If the client wants to sweep the problem under the rug, then attempting to achieve a quick and quiet settlement is the best approach. In such an

instance, I typically will call the other attorney in an attempt to resolve the dispute with the least amount of time, expense, and disruption to both sides. If the client tells me they want to crush their opponent no matter the cost, then we will come out with both guns blazing and put immediate pressure on the other side (within the limits of the substantive and procedural law, of course) by filing a complaint. Those are the two extremes, and sometimes there is a middle ground where, even where initiating or responding to formal litigation is necessary, you might take a less aggressive position out of the gate in order to leave open the potential for early settlement negotiations.

Even when clients want to litigate aggressively from the outset, I generally advise them at least to let me make an initial contact with the other side to find out whether the dispute can be resolved quickly short of incurring the hassle and expense of litigation. Some people think that making the first settlement overture is a sign of weakness, and it can be, but not if the opponent is approached in the right way. Certainly, if you go to them with your hat in your hand, then that will signal that your client is not willing to go the distance. However, there are ways to broach the subject of settlement early in the game without sending a message that your client has a weak constitution for litigation, particularly if you couch the overture as one made on the attorney's own accord and as a matter of routine.

It is important to keep your clients' position in the market in mind at all times when assessing the best approach to resolving a technology dispute. In the customer/vendor situation, if I am representing the vendor, I typically want to keep everything on the "down low," so to speak, and out of the court system in order to avoid any potential negative publicity. If I am on the customer side, I will take a different approach and even remind the other side that everything that is filed with the court is accessible to the public, including the detailed descriptions of the problems with the subject product that will be contained in my client's impending complaint and other court filings. Oftentimes, the vendor will blink solely because it doesn't want that kind of negative publicity, which potentially could tarnish its reputation in the industry.

**Assessing Important Documentation**

It is crucial to find out what communication there was between your client and the other party before the relationship was formalized. Certainly, you want to

secure whatever contracts there are and any amendments to the contracts. If it's a development contract, you need to see milestone documents to see what the expectations and obligations were at various points along the path of the relationship and whether or not those were met. Then, you want to examine any pre-litigation and post development communication to figure out the parties' respective current positions, including the customer's complaints and the vendor's responses to them, if any. Other important documentation will explain what the product is supposed to be and do, which will help to explain the alleged problems with it.

**Advising on Financial Liability**

The first thing to get a handle on is, what is the maximum range of potential damages. If we are dealing with a contract dispute, then the amount at issue typically is limited to the value of the contract. However, misrepresentation claims are oftentimes made to attempt to expand the range of damages beyond what is stated in the contract to consequential damages. If the dispute involves intellectual property or violation of statutes, then statutory damages potentially come into play.

The second important piece to analyze is the potential litigation expense in terms of attorney's fees, expert fees, and other hard costs. For example, if there are numerous witnesses spread around the country who must be interviewed and are likely to be deposed, then travel costs must be factored into the overall estimate. Also, some clients assign dollar values to their employees' time, so if you estimate that a particular employee must devote a certain amount of time working on a litigation matter instead of performing his/her regular duties for the company, then that corresponding cost must be estimated for the client. By calculating this estimate at the outset of a dispute, it can assist the client in evaluating whether an early settlement would be the preferred approach, i.e., to offer some or all of that amount in a "cost of defense" type of settlement, or whether the cost of the litigation will eclipse the amount of recoverable damages or significantly erode the damages such that the effort, disruption, and risk of litigation would not be worth it.

## Dealing with Unrealistic Goals

My role in my relationship with clients is, in addition to advocate, that of a counselor. I do my best to estimate (not guarantee) the potential outcome of the dispute depending on whether it is to be tried to a jury, judge or arbitrator, and in light of that estimate, I advise them of the best way to reach their desired outcome. At that point, it is up to the client to decide whether to follow my advice. If they have expectations that I consider unrealistic, then I will explain to them why I think so. Ultimately, however, the client is calling the shots and will be the one that has to live with the consequences, positive or negative. As long as I feel that I have informed the client fully about the cost-benefit analysis, the potential risks, the potential positive outcome, and what I perceive, based on my experience in these types of disputes, to be the preferred approach to get there, and they still tell me they want to go another route, I will follow their instructions as long as they are within the boundaries of the law and ethical limits. However, in that situation, I will make sure to have a heart to heart talk with the decision makers within that client company to make sure they understand all the details and are making an informed decision. I will also put my advice in writing so they not only will hear it come out of my mouth but also have the opportunity to review and visualize it before they make their final decision. I want to make sure that the direction they choose is the one that they truly want to go and that they understand the potential implications of that decision.

## Successful Settlement

At my very first mediation, a now retired federal judge told the parties, "As long as both sides are walking away from this thing licking their wounds a little but live to fight another day, that means it was a good settlement." From a client's perspective, when I am advising them on a potential settlement, I focus on how this settlement will affect their business going forward, more so than I would on whether they are giving up more than they should strictly within the context of this one dispute. In other words, if I am defending a client in a lawsuit, then I will ask them how it will affect their business life if they pay whatever the demand is, whether it is worth it to pay a certain amount of money now to avoid the time and expense and potential negative publicity to their business going forward, whether by

settling now it will set a negative precedent with their other customers, and the like. If they think it is worth it and as long as the costs don't cut into their bottom line more than they can afford, then I will advise them to make the settlement. If they have an axe to grind or they feel like their reputation is at stake and they need to litigate the dispute to the end and win for reasons other than financial, then I would advise them not to settle. The most important thing is that the client makes an informed decision, after careful consideration of all of these factors.

**Arbitration and Mediation**

Arbitration is oftentimes dictated by the agreement between the parties. Many technology-related contracts contain mandatory arbitration provisions. The form of the arbitration can vary depending on the terms of the agreement. Sometimes, even if there is no arbitration agreement in place, the parties can later agree that the dispute be resolved in binding arbitration, which can have positive and negative impacts depending on the type of dispute and relative position of the client. For example, in a dispute that has severe negative public relations implications, litigating the case in binding arbitration can be advantageous, because the proceedings typically will not be open to the public (and the parties even can agree that the ultimate award may not be filed with the court for enforcement unless it is filed under seal). So, for clients concerned about how the PR aspects of a case could affect their business, I may advise them to propose private binding arbitration, which, if accepted, could achieve one of the client's goals (of no negative press), even if the arbitrator's decision ultimately goes against them.

Other disputes might be so complicated that private arbitration is a must, because you will want to be able to handpick someone with relevant experience and expertise to decide the complex factual and legal matters at issue.

In terms of mediation, many contracts in the technology space have provisions that require mediation of a dispute before either party is able to demand arbitration or to file a case in court. Many times, these mandatory mediation provisions operate as designed, and the dispute is settled early and without extensive litigation. Unfortunately, however, another outcome of mandatory mediation is that one party is just "checking the box" so that they can proceed directly to all-out litigation. (I have experienced that

phenomenon a number of times in my career, but I must say that I borrowed that catch phrase from a retired California Supreme Court Justice, who coined it during a mediation in which I participated a couple of years ago.) Such an experience is disheartening, because both sides are supposed to engage in mediation with an open mind, be willing to compromise, listen to the neutral's assessment of the case, and in light of the neutral's opinion make proposals in good faith in the hopes of resolving the dispute. The only saving grace about "box checkers" are that they typically show their true intentions early in the mediation process, so that not too much time and emotional energy is wasted, and, at the very least, the client has received the mediator's assessment of the case, which can be helpful going forward in the litigation.

Even if there is no contractual requirement, I usually recommend that the client engage in an early mediation to see if they can shortcut the litigation and put the dispute behind them. Many times both sides want that, and when people get to mediation, they realize they are really not that far apart or that one side is legitimately in the wrong once they get an independent third party assessment of their position and how it will play to a finder of fact.

**Common Client Mistakes**

Some of the most critical mistakes I see made by clients occur well before a dispute even arises. For example, clients often write contracts themselves without engaging an experienced attorney. Some of the language contained in these self-written contracts will elicit the question: "Who wrote this thing?" Sometimes the answer is a person on the management team or in the sales department, who did not even pass it by their in-house counsel for review, and the contract is so poorly worded and full of traps that the dispute is practically lost before it even begins. I recommend to all of my current and prospective clients that we review their current contracts to tighten up the language so they are an asset, rather than a liability, in potential future litigation. It can be difficult to convince a client that the form contract they have been using for years is not worded to their best advantage, and that they should pay an attorney to review a contract that has worked well for them in the past, but it usually is money well spent the next time a dispute arises.

**Common Attorney Mistakes**

The biggest pitfall that someone who doesn't do a lot of technology litigation can fall into is treating it as a standard commercial dispute. I realize I have used this term several times in this chapter, but it is important to think outside the box. In my experience, people that run technology companies tend to think differently. Most, if not all, of them are very entrepreneurial and creative. In order to find a resolution, you need to think the same way, and it all circles back to figuring out what your clients' goals are and what they desire to be the final outcome. You also apply that type of thinking when trying to anticipate the goals of the opposing side, because many times it's more than simply the number of zeros on the settlement check that dictates whether a dispute ultimately is resolved amicably. Another common attorney pitfall is that they often do not understand the technology at the core of the dispute. If you don't understand how the technology was designed and is supposed to be used, then that can impact negatively how an attorney litigates the matter, whether it's not finding the right expert or requesting the right documents.

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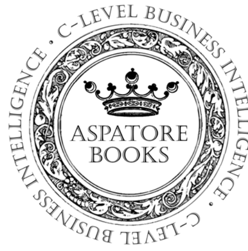


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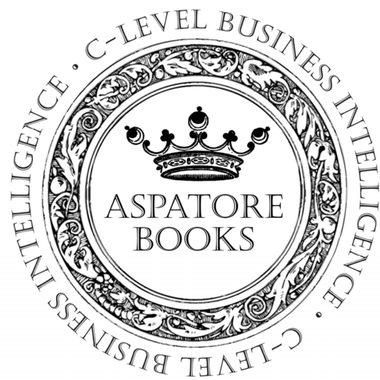

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