

Civil lawsuits could benefit from a second opinion

By MIKE COSTANZA - 12/9/2016

Concerned about how your civil case is going? Perhaps it's time to get a second legal opinion.

"A person may just have some uncertainty, and a second opinion could bring peace of mind," says Chad Flansburg, an associate at Phillips Lytle LLP.

A second attorney or law firm could also: a) discover the wrinkle that wins the case, b) help settle boardroom disputes regarding the direction the case should go in, and c) boost the chances of winning on appeal.

And a case that might prove very costly for a company could particularly benefit from a fresh set of eyes.

"I would look at that as a 'bet the company' situation," says Christopher Thomas, a partner at Nixon Peabody LLP. "Literally, the future of the company rises and falls on the advice that's given."

Many of the cases Susan Ivy litigates carry such weight.

"A lot of them, the litigation goes on for years, and it is extremely costly," says Ivy, who is a partner at Harris Beach PLLC. "What's at stake is tens of, hundreds of, millions of dollars."

Litigation of this kind can involve a host of subtle issues. Though the attorney who handles the case might set the best strategy at the outset, a re-examination of the issues could still benefit the client.

"There may actually be a couple paths forward, and it's a strategic call," Ivy explains. "When it's high-stakes litigation, the cost of getting that second opinion becomes minimal in the grand scheme of the case."

Periodic examination by an outside attorney or legal team can create a better focus for litigation that spans years.

"We welcome it, because in complex commercial cases that are worth tens and hundreds of millions of dollars, you, as the attorney, want to get it right," Ivy explains.

Even cases that do not involve huge risks can cause rumblings among a company's top executives. Should those executives disagree about whether the law firm hired to represent the company is performing well, the firm's general counsel could be in a bind.

"The last thing you want is for your general counsel to be put betwixt and between members of the C-suite," Thomas explains. "Getting that second opinion can take the general counsel out of the line of fire."

Second opinions can also prove beneficial when a case has made its way into a state or federal appeals court. Oftentimes the original attorneys have difficulty reaching beyond the issues that arose in the trial court and the means they used to overcome them.

"If you won, a lot of times your instinct will be to make the same arguments and assume that you'll win again," Ivy says. "If you lost, your instinct many times is you must have lost because the court was wrong. You'll make the same arguments, but the court will get it right this time."

A new attorney could review the case, seeking elements that did not emerge in the original trial and considering alternative legal approaches. Both could prove useful in the appellate court.

“Whether you won or lost, it is a very good idea for someone to give it a fresh look,” Ivy says.

In rare cases, a client might feel the need to bring in a second attorney to closely examine the work of the first.

“They suspect some type of improper or incompetent or insufficient handling of the case,” Flansburg explains. “Your case is moving too slowly, with no explanation from your attorney, or your case is costing a lot, but you’re not really seeing any results or value for those costs.”

Whatever prompts an individual or company to seek another opinion, local attorneys say they would generally welcome those brought on board to render it.

“An attorney should not be concerned about another attorney looking at his or her work or advice to a client if the attorney is confident about his or her advice to the client,” Thomas says.

That is not to say that second opinions are appropriate in every kind of civil case. For example, attorneys who practice matrimonial law have little or no leeway in calculating child support.

“The law does set forth how you calculate it,” says Sara Stout Ashcraft, a partner at Ashcraft Franklin & Young LLP. “The person is not going to be hearing a different answer from another matrimonial lawyer.”

How might an individual or company find the right person or law firm to examine its legal situation anew? Clear goals are essential.

“Try to clearly define what it is that they’re asking this other attorney to do,” Flansburg says. “Try to frame the issue, meet with the person to clearly define what that other attorney is going to do and try to put a budget in place to do it.”

The location of the court in which the lawsuit will be heard can also drive the selection of a new legal firm.

“You’re in a specific jurisdiction, and you’d like to get some local knowledge and a local perspective,” Ivy says. “That firm should come from the jurisdiction where the case is pending.”

That legal firm might also need specialized knowledge of the client’s field or business.

“It’s so important to get counsel that knows the business and knows the regulatory framework within which the business is working and knows the contractual relationships that the business is working under,” Thomas says.

Once a second attorney or law firm has been brought onboard, all involved should join together as colleagues.

“You really want people to have a cooperative view and cooperative attitude and always keep the client’s interests on top,” Ivy says.

In all but the rarest of cases, the resulting second opinion should not prove strikingly different from the one that was originally rendered.

“There’s usually just a sort of an incremental difference in opinion or approach,” Thomas says. “But it could be meaningful.”

Mike Costanza is a Rochester-area freelance writer.