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Minimize the anguish of ending a long-term contact

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Contracting parties spend a lot of energy on the terms governing their relationship going forward. Less often is much focus placed on delimiting the terms governing "breaking-up" the relationship. Failing to give proper consideration to how a contract will end, however, can be costly. Even when parties have had the foresight to draft termination language, failing to follow those terms can lead to an expensive legal headache. Fortunately, minimizing the pain of a bad break-up can be accomplished by making deliberate moves throughout the contract lifecycle:

1.Think about the end at the beginning;

2.Follow the rules you create; and

3.Consult counsel before the fighting starts.

Making the right moves will not eliminate every potential problem, but will empower you to act deliberately and pro-actively, the way you hope to approach all business decisions.

Think about the End at the Beginning

Thinking about the end at the beginning can help to avoid problems in terminating an agreement. Before entering a long-term relationship, make sure the agreement provides a way to get out that makes sense. In the absence of express language, the law presumptively allocates risks in contractual relationships. There is no reason, however, to leave risk allocation to a court that does not know your business or your deal, especially when you can allocate the risk yourself by writing it into your agreement.

There are two basic varieties of termination: "at will", and "for cause." At will termination allows a party to end the agreement with or without a reason. For cause termination, on the other hand, requires that a substantial enough reason exist to establish "cause" for terminating. Courts generally will not imply "at will" termination in contracts that have a specified lifespan. Thus, when near-perfect performance is important, providing for termination "at will" is not only appropriate, but necessary. Failing to put such a term in your agreement can unintentionally limit your options.

When "for cause" termination is contemplated, as is often the case in technology licensing, and supplier and service provider agreements, "cause" should be defined. For example, if the contract contemplates key functions, performance or deliverables, "cause" should be based on those particular standards. The parties should then track performance under the agreement. Any analysis of performance should provide a genuine evaluation—sugarcoating, exaggeration or understatement will not help.

For cause agreements often require giving notice and an opportunity to cure deficiencies. Under such agreements, the amount of notice required should reflect actual business pressures. Arbitrary timelines are seldom useful. For example, if the business cycle is monthly, the notice and cure period might require a resolution in thirty days.

Follow the Rules You Create

When a contractual relationship sours, terminating necessitates taking another look at the contract. Too often, parties make hasty decisions before consulting the terms they negotiated, and fail to take the proper steps to terminate. Failing to comply with the terms of the existing agreement can turn the tables, putting a terminating party on the defensive in a lawsuit.

Parties often carefully weigh termination, but then rush to implement their decision. Hastily placing a call or sending a letter declaring the agreement is terminated can be a mistake. Unless the deficiency giving rise to termination is a material breach of the contract, terminating in such a manner often is itself a breach of contract, especially where the contract requires notice and an opportunity to cure. A serious misstep can have the unwelcome effect of both discharging the other party from having to perform, while