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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

3 Questions To Ask Before You Try To Transfer A Case

By **Kelly Knaub**

Law360, New York (September 8, 2015, 4:52 PM ET) -- Most attorneys agree that transferring a case can sometimes be the move that leads to a successful outcome, but it's an uphill climb to convince a judge to send a suit to another jurisdiction. Here are three questions you should ask before deciding to take on a transfer fight.

Is the Law Better Somewhere Else?

One important factor to consider when deciding whether you want to transfer the case is how good the law will be in a particular jurisdiction, attorneys say.

"The law may be better for your case in either New York or Texas, so you want to be in a jurisdiction where you have good law in your case," Steve Cooper, a partner with Reed Smith LLP's commercial litigation group, told Law360. "Also, the court may have a reputation for being either pro-plaintiff or pro-defendant, so that would influence the decision on whether you want to move it or not," Cooper said.

Andrew Langsam, an intellectual property and litigation partner at Pryor Cashman LLP, agreed. He had a patent infringement case transferred from Texas' Eastern District to a California federal court by the district court itself, which has been pretty unusual for that district.

"There were many factors we considered in making the motion to transfer, but one of them is the perception that has been around for several years, which is that the Eastern District of Texas is a very pro-plaintiff patent jurisdiction," Langsam said. "So one of the factors we considered was, we were representing defendants."

The local rules of the various courts ought to be considered as well, Langsam said.

"If for example, as a defendant, you want the case to maybe take longer ... so you have more opportunity to do discovery and find some new great prior art, maybe you would not make the motion to transfer into the Eastern District of Virginia because it has that 'rocket docket,' which means everything is expedited," he said.

Can You Argue Convenience?

One common argument attorneys make to a judge is that most of the witnesses and documents are in another state or that there's a similar case before another judge on exactly the same issue, Cooper said. One example of the latter could be a car company getting sued for a particular defect in both Texas and New York, he said, adding that you then want to bring those cases together.

"Basically, it's a convenience thing," Cooper said.

If a case involves a car accident in Texas but the suit is filed in New York, it would probably be a good argument to move it to Texas because the witnesses are there and Texas has an interest in the case because the accident occurred there, according to Cooper.

"You're basically arguing to the judge convenience, and it doesn't belong in the other state and it does belong here, and it was only brought in New York for strategic reasons," Cooper said.

In bankruptcy cases, it is ordinarily a creditor or group of creditors who seek to have a case transferred, according to Jonathan Flaxer, a bankruptcy partner at Golenbock Eiseman Assor Bell & Peskoe LLP, noting that the company or debtor gets to choose the venue.

"Courts give that choice of venue a fair amount of deference," Flaxer said. "It doesn't mean venue cannot be transferred, but generally the courts will give a fair amount of deference to the debtors' initial choice of venue."

If you're representing creditors or other parties in interest who are seeking to have the case transferred, you're going to be arguing convenience of the parties and interests of justice, Flaxer said. That can be done by putting together a record for the court that includes where the largest creditors are located, where the company's assets and offices are located, and where the nerve center of the company is, he added.

"Even if the assets are in Arkansas, the executive offices are in Chicago," Flaxer said. "So really, all the thinking and the high-level people are in Chicago. Move the case to Chicago from wherever it was filed."

It can be difficult to persuade a judge to transfer a case, Cooper said, if it isn't clear that most of the events in the case occurred in one state and that most of the witnesses and documents can be found there.

"If it's split between the two states, and the plaintiff is a resident of New York, it's not the easiest thing to do," Cooper said. "You really need to make a good case that it is wasteful to keep in New York and not efficient."

There's a presumption that the court that originally got the case is the right one, so an attorney has to overcome that presumption that the plaintiff has a right to be in the forum that he or she wants to be in, he added.

If there are two pending actions with the same issues and same discovery, it would make sense to have the cases consolidated, Cooper said. Otherwise, it would be a waste of time and money. The courts would expend resources having two different judges looking at similar cases, and, he noted, you would also run the risk of having two decisions that aren't entirely consistent.

Is Your Opponent Gaming the System?

When Langsam succeeded in getting the patent infringement case transferred from Texas' Eastern District to California, he said they pointed out to the judge in Texas that the plaintiff had manufactured an argument to make a claim to venue in Texas.

They argued to the Texas judge that the plaintiff had been formed two days before the complaint was filed and that they discovered — after sending a private investigator to the office the company was renting — that no one had ever picked up the office keys nor any of the mail, all of which was junk mail, he said.

Langsam said that when the judge transferred the case, he referenced in his decision the absence of doing real business in Texas, as well as the absence of witnesses and documents and the fact that the defendants and plaintiff patentee were California residents.

"We wanted a fair to chance to litigate on the merits and not be under the Texas court docket system nor the good ole boy network of attorneys down there," Langsam said.

Flaxer cited an example of a bankruptcy case in which some companies of an affiliated group filed in New York while others filed in Delaware. The judge felt that they were trying to make it difficult for the creditors and that all the affiliated cases should be in the same court, not split between two courts, he said. So the judge moved the Delaware cases to New York.

"If you can come up with some argument that there was something disingenuous or seeking a tactical advantage or artificial about the placement of venue, that would be helpful in getting venue transferred," Flaxer said. "Judges don't like any sense that games are being played."

--Editing by John Quinn and Philip Shea.
