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Litigation Management: The Critical Steps to Achieve Success and Reduce Costs

Litigation and Dispute Resolution

CHEAT SHEET

- ***Ready for battle.*** Litigation is a normal part of business practice, and requires the diligence of in-house counsel to ensure a positive outcome.
- ***Creating a strategy.*** By developing a concrete plan for impending litigation, in-house counsel can better organize an internal discussion in a way that advances company strategy.
- ***Minimizing the blow.*** You should plan to execute litigation strategy in a way that minimizes

cost, time, and damage to the company's reputation.
- ***Learning a lesson.*** It is important to spend time after a closing to discuss possible changes that could make the process more efficient in the future.

While some companies manage to avoid litigation, most will encounter it. It may be a series of repetitive matters in particular subject matter areas, a critical issue with significant potential cost or reputational effects, or "bet the company" litigation where the future of the company is at stake. Many larger companies have in-house litigation management attorneys, but in small- to medium-size companies the job often falls to either a small legal staff without specific litigation expertise or to non-lawyers. Worse, many companies essentially rely on their vendor or outside counsel to manage litigation. No matter what the quality of outside counsel, they should not operate as both vendor and vendor manager. Even apart from the inherent conflict of interest, the most talented and diligent outside attorneys will not have the same deep grasp of the business imperatives affecting litigation. Further, there will be many strategic decisions that should be informed by factors and considerations that are beyond the expertise of your outside litigation counsel.

Unfortunately, the nature and importance of in-house litigation management is not well understood. In fact, it is one of those jobs that if done well, the effects may go unnoticed. It is not obvious when burdens are reduced, costs are controlled, mistakes are averted, or public relations disasters are avoided. In contrast, failure to properly supervise a litigation matter in-house, whether due to time constraints or to lack of specific litigation expertise, can have serious consequences. It can result in an unnecessary delay, missed opportunities for resolution, unfortunate strategic choices, unreasonable burden on the business, negative publicity, damage to a company's brand, and excessive cost. In virtually every case, a company will significantly benefit, both with respect to outcome and cost, by having someone in-house closely manage its litigation.

Managing litigation requires several critical steps including the following:

- Develop and define a "win" at the outset;
- Investigate insurance and indemnity status;
- Hire the right outside counsel;
- Negotiate and closely monitor fee arrangements;
- Facilitate internal communication and systematic reporting;
- Oversee ongoing strategic decisions;
- Ensure that all pleadings and communications are consistent with business and litigation strategy;
- Minimize the burden on the business wherever possible;
- Continually look for opportunities to resolve matters favorably;
- Provide careful attention to compliance; and,
- Look for ways to implement process improvements.

Each of these steps is discussed more fully later.

Develop a winning strategy

It is critically important to develop and specifically define what constitutes a "win" at the outset of any litigation process. You have to know where you are headed to map the best route to get there. At

first, it may appear that this is a simple inquiry. However, there are often many potential paths to victory. For example, the end result of a patent litigation could be a licensing or cross-licensing arrangement, or an acquisition or partnership. While the end game is generally fully considered when a company initiates litigation, it is often less thoroughly evaluated when a company responds to a lawsuit. The short timeline for initial response and the understandable urge to react aggressively can result in skipping this critical step altogether, as well as actions, and sometimes kneejerk reactions, that are ineffective, ill advised, and costly. For example, there can be an initial impulse to try to challenge venue via a motion to transfer. Sometimes such a move is warranted but while it may have surface appeal as a first strike, there are important questions to be answered. Are there procedural or substantive advantages to the current venue even if inconvenient (e.g., better case law or speedier or slower trajectories)? If the grounds for the motion were not strong and it fails, will it create a negative impression before the trial judge? Likewise, impulsive action can result in missed opportunities such as potential counterclaims or defenses or joinder of additional parties. In every case, being mindful of the desired ultimate outcome(s) should inform the strategic steps. Sometimes, the end goal requires thinking well outside of the litigation “box.” For example, a company called ClearPlay, Inc. was sued by several Hollywood studios in connection with the technology it provided, which allowed consumers to filter movie content and remove what they found to be objectionable. ClearPlay was able to prevail in that “bet the company” litigation as a result of a change in the applicable law, the introduction and passage of the Family Home Movie Act of 2005.

There are very few litigation matters that are ultimately resolved by a jury verdict in court. In most commercial litigation matters, the end result is a settlement. Defining and understanding the parameters of a successful outcome(s) is critical to managing the entire process.

Consider insurance and indemnity status

In conjunction with defining a winning strategy, it is important, at the outset, to investigate insurance and indemnity status. With respect to insurance, it is possible that that matter is covered and, if so, attorneys’ fees and costs may also be covered. Most insurance policies have specific notice requirements that must be carefully observed to preserve rights. It is also possible that coverage will be denied or debated without sufficient cause. In such cases, it is important to follow appropriate procedural and substantive steps to secure the coverage to which you are entitled.

Likewise, it is important to investigate indemnity obligations, in both directions, especially in contract, patent, and licensing disputes. You may be entitled to full indemnity both for any damages and attorneys’ fees. You may have also provided an indemnity. In such cases, it is important to understand the scope of those obligations and do as much as possible to protect yourself from unreasonable costs. Again, as with insurance, it is important to follow the prescribed procedures to avoid impairing those rights. Failure to fully investigate insurance and indemnity provisions that may be applicable, at the outset, can have huge economic consequences.

Hire the right outside counsel

Hiring the right outside counsel with outstanding competence and the willingness to be a good business partner is one of the most critical steps. This is especially true since changing counsel mid-course can be a difficult and fraught process. The three most important criteria for hiring outside counsel in a litigation matter are: (1) they should be experienced and successful litigators; (2) they should be experienced in the subject matter of the litigation; and (3) they must be good business partners.

But how can you make this determination? First, with respect to competence, always hire the lawyer, not the firm. While it is certainly helpful to have an ongoing relationship with a firm that you trust and has provided good results in the past, each time you hire for a significant litigation, you should look for the best individual lawyer for that matter. One of the key reasons that it makes sense to have sophisticated in-house litigation support at the outset is that this selection process itself depends on skill and judgment. It is very difficult for a non-lawyer or even non-litigator to evaluate litigation expertise, let alone in a particular subject matter. This is especially true since most litigators can “talk a good game;” it is their stock-in-trade. While that is a valuable skill, it can make vetting lawyers very difficult.

Reputation matters but you should not rely on it standing alone. While many reputations are deserved, some are the result of luck or good press. Likewise, law firm websites can provide important data but you should not rely on them to confirm expertise (many lawyers subscribe to a variation on the doctors’ code, “watch one, do one, teach one,” that goes “do one, hold yourself out as experienced in that entire area”). There are certainly resources that can be very helpful to identify appropriate counsel including referrals from other lawyers, Chambers and Partners directories, Martindale Hubbell ratings, and general internet research (for attorneys who have achieved success in the type of litigation that you face). However, none of these resources are a substitute for interviewing the proposed counsel (face-to-face) and talking with other clients of that attorney. Indeed, the most important due diligence is talking with other clients of that attorney. You would check references for any important hire for your company and hiring outside litigation counsel is exactly that.

In addition to confirming skill and expertise, you must evaluate how good of a partner your outside counsel will be. You can determine a lot about the partnership aspect of the relationship by three things: (1) how well the fee negotiations go; (2) how interested they are in your business goals; and (3) how responsive they are. A take it or leave it approach to fee negotiations is a huge red flag. Again, obtaining other client recommendations is key to this inquiry.

Once you hire the right counsel, it is important that you make sure you are comfortable with all members of the team. The last thing that you want is to hire someone after careful diligence and have the matter essentially delegated to more junior lawyers. It is important to note, that while less experienced lawyers likely have a lower billing rate, inefficiencies can essentially negate that difference. While there are some tasks that can and should be performed by more junior attorneys (e.g., initial document review in a high volume document case or legal research), some tasks, such as drafting major substantive briefs, negotiating disputes, and taking key depositions, are better and more efficiently accomplished by the partner that you vetted and hired.

While it is difficult and sometimes expensive to change counsel, if you are not satisfied, you should do so at the earliest opportunity. Unfortunately, issues that you notice at the inception of the relationship are likely to get worse, not better, as the matter intensifies and the deeper you are in the litigation, the more difficult it becomes to make a change.

Managing international disputes

Commercial transactions and related disputes increasingly involve international dimensions. While fundamental litigation management principles apply, the transnational aspects of a conflict can add great complexity and substantial expense.

The best approach is to anticipate and expressly address dispute-related questions at the outset of the relationship. This includes determining whether the matter will be resolved by litigation, arbitration, or some other form of alternative dispute resolution as well as understanding and specifying, as much as possible, how that chosen path will unfold. In some cases, it may be appropriate to have a mechanism for security such as a letter of credit or escrow arrangement.

If the choice for a dispute resolution mechanism is litigation, it is critical to understand where the litigation will take place, what law will apply, and how it will proceed. Some basic questions regarding the process of the litigation might include how long it will take, whether translation will be required, what discovery is permitted, what appellate remedies exist, and how a judgment will be enforced. No matter what country you're planning to litigate in, it is necessary to hire local counsel familiar with the litigation process in that country. If you are litigating in the United States, you must ensure that: (1) you will you have proper jurisdiction over the litigants; (2) you will be able to obtain the evidence that you require if the evidence is located outside the United States, and (3) you will be able to enforce the judgment.

Arbitration can sometimes be a less expensive path to dispute resolution in an international context. The effectiveness and cost of arbitration will depend, among other things, on the applicable rules, the scope of discovery, the speed at which the arbitration will proceed, the skill and experience of the arbitrator(s), and the enforceability of the award. If you elect arbitration, there are myriad choices to be made regarding the arbitrator(s) and applicable rules. Some resources for international arbitration include the International Chamber of Commerce (ICC), which offers the International Court of Arbitration, and the World International Intellectual Property Center (WIPO), which offers the WIPO Arbitration and Mediation Center.

You may also choose, usually in addition to litigation or arbitration, another alternative resolution path such as mediation or a specified settlement process. For example, you might require a series of meetings at the outset of a dispute before any litigation or arbitration is commenced. Face-to-face dialogue can often create a powerful momentum toward resolution. While these methods do not guarantee a final outcome, that is often equally elusive in litigation or arbitration. Given the cost of litigation and arbitration, building in a required threshold settlement process to a trans-border transaction is always a good idea. Just make sure that you can enforce the final agreement if one is reached.

Failure to fully consider the international dimensions of a dispute can result in a quagmire of tangents, inefficiency, risk, and expense. The best route to manage international disputes and avoid that morass is to think through and negotiate an effective process at the outset of the relationship. However, even if a dispute resolution mechanism was not fully or favorably specified by contract, it may still be possible to negotiate it when a dispute arises. Under all circumstances, when dealing with disputes that involve cross border parties or issues, it is critical to carefully consider the international aspects of the dispute and to retain outside litigation counsel experienced in transnational matters.

Negotiate and manage fee agreements

It is essential to negotiate and very closely monitor fee arrangements that maximize value and predictability. Indeed, most businesses would not hire any major vendor without careful negotiation

and as much certainty as possible with respect to cost.

The default position for legal fees is the billable hour. That is, you will be billed a specific rate for the lawyer's time, plus costs. Under all circumstances, if you agree to a billable hour approach, you should make sure there is a specific budget agreement in place and then carefully monitor it. This can be extraordinarily complex, time-intensive, and difficult to manage. For example, budgets are often provided with respect to tasks (e.g., motion to dismiss, written discovery, depositions, trial, etc.) but bills are most often generated chronologically with entries of person, time, and tasks. Oftentimes this occurs without the tasks aggregated for comparison. This makes for an extremely difficult apples and oranges juxtaposition. You should insist that the budget and bills correspond to one another in a way that enables ready comparison. In addition, budgets are not caps and are often provided with so many caveats as to make them meaningless. This is, in part, a function of the fact that litigation matters are not entirely predictable. The trajectory can depend on the dozens of factors including, for example, the practices of a particular judge, the nature of opposing counsel, the scope of discovery, or the number and nature of interim disputes. While some caveats are reasonable, minimizing those loopholes as much as possible is important. However, in view of the limitations of a straight billable hour approach, alternative fee approaches are a much better path.

There are a variety of alternative fee approaches that can support predictability and cost controls, the use of which depend on the specific situation. Each strategy has pros and cons. For some examples, there are simple discounts, capped fees, fixed fees, retainer arrangements, and discount/success fee combinations. These alternatives can be provided with respect to the entire matter or with respect to stages of a matter, although the latter approach is sometimes difficult since there are not always sharp dividing lines between the phases of litigation. While discussing the pros and cons of each approach beyond the scope of the article, I will make two comments. The first is, where possible, a capped fee can be very effective. It ensures predictability but prevents payment for unnecesssary services (the downside of the fixed fees). The major downside of capped fees is that when the cap is reached, it can create disincentives for the law firm. This requires careful attention. I also note that success fees should not really be an "incentive" in that success is what is expected when you hire counsel. However, when combined with a significant discount, it can be an effective approach to share the risk.

Facilitate internal discussion and alignment

Facilitating ongoing internal communication and systematic reporting to ensure alignment with business goals is critical to both the business and to the conduct of the litigation. For the business, it ensures that key stakeholders are engaged, aware of the goals and timeline of the litigation, and informed of their compliance responsibilities. It also keeps potential witnesses and/or document custodians that are aware of and invested in the process. It is also important to the conduct of the litigation to be continually connected to business imperatives, which may change and evolve over time. For example, there may be potential for a positive business resolution, such as a licensing arrangement or acquisition, which did not exist at the inception of the matter.

It is also important to the conduct of the litigation that the business avoid actions that contradict or undermine the agreed litigation strategy. For example, it is important to have communication and alignment between marketing and litigation in matters where both share the same subject matter. For instance, if a business is litigating an important trade dress case, it is critical that the marketing team and litigation team consult with one another before that trade dress is altered in a particular marketing campaign. In almost every case, a solution that satisfies the business goals, including litigation goals, can be found with dialogue.

One of the primary goals of internal reporting and discussion is education. A key component of education is the nature of attorney-client privilege. Communications with an attorney (whether outside or internal) for the purpose of obtaining or receiving legal advice are generally protected from discovery. However, preserving attorney-client privilege requires careful attention. For one clear example, privilege can be lost if the communication is disclosed to a third party. Employees must understand that they cannot share legal communications outside the company for any reason. Another example of crucial education is the process of document preservation and production, including the importance of litigation holds.

Litigation is, more often than not, a labor-intensive process, and often feels to business stakeholders like a burden or distraction. Sometimes, this can result in a “shoot the messenger” problem where that burden and distraction is attributed to the in-house team rather than the litigation itself. The best remedy for this is information about: (1) the goals of the litigation; (2) the nature of the litigation process, both generally and specifically; (3) updates on current events in the litigation; and (4) the likely timeline. Depending on the size and importance of the litigation, this can be accomplished through scheduling update meetings devoted to the litigation or setting aside a few minutes in regularly scheduled meetings to report on the litigation. It may also be accomplished through written updates, but it is important to be certain that such updates will be protected by the attorney-client privilege to avoid having to share them with your opponent.

Strategic oversight

Despite how critical it is to both the outcome and the cost, one of the least understood or appreciated aspects of litigation management is strategic oversight. Through the course of any moderately complex litigation, there are literally hundreds of strategic decisions to be made, large and small. In a large, active litigation, these decisions can be required on a daily basis. Evaluating the risks and benefits of particular actions should be a joint endeavor between outside counsel and inside litigation management.

There are many potential paths to take for each strategic or procedural move in any moderately complex litigation and decisions must be constantly made. Make sure these decisions are clear and easily delegable to outside counsel. But many of these decisions will be far from clear and will be guided by some combination of business goals, information, timing, leverage, assessment of probable outcomes, budget, experience, and judgment. For every important decision, it is essential to identify the available options to make a truly informed choice. There may be many options or few, but too often clients are provided with a recommended course of action, or a course of action is reflexively pursued, without identifying and extensively thinking through every possible option. For example, should a particular discovery dispute be fought in court via motion or should it be conceded? If conceded, will it open the door to similar disputes? There can be dozens of issues like this during the course of discovery. In some cases, failure to fight can be a huge tactical mistake, opening the door to massive additional demands or even waiving an important substantive issue. On the other hand, fighting a battle that is lost is expensive and can result in a loss of leverage or credibility. For another example, outside counsel may not appreciate the advantages or disadvantages of submitting a written affidavit from a witness who may turn out to be a terrible deponent or trial witness. Likewise, many, if not most, complex litigation matters require use of experts to provide opinions on disputed matters (including how technology operates, the nature of an industry or market, or the nature and scope of economic damages). Decisions about retention of such experts require intensive business participation including identifying potential experts, evaluating their qualifications, negotiating the budget and, ultimately, overseeing their work. Of course, the recommendations of your outside counsel are key, but many of the strategic issues will depend more

on your knowledge of the business — or even of the opponent — rather than on specific litigation expertise.

Some of these litigation decisions have the luxury of time to fully consider a response but many decisions that can affect the future trajectory, including cost trajectory, of the litigation must be decided literally on the spot at a trial, hearing, or deposition. Accordingly, another highly important aspect of litigation management is attending depositions and court hearings. Even apart from decision-making requirements, direct contact with the opponents and the judge overseeing the case can yield valuable insights that cannot be captured by secondhand reports.

Ensure that pleadings and communications advance business strategy

One of the most important reasons to carefully manage litigation is to make sure that the litigation advances the goals of the company — both the goals specific to the litigation and the general goals of the company. Someone acting for the company should review every pleading and significant correspondence. Failure to do that can result in major problems. For example, a pleading drafted by the outside firm may misstate or inadvertently misrepresent a fact. Failure to catch that can be embarrassing and costly. Likewise, a pleading may reveal something that the business views as sensitive competitive information, such as subscriber numbers or release dates. A pleading may set forth a legal argument or defense but do it in a way that can cause a public relations problem. For example, a business may have a perfectly proper defense in a sensitive discrimination matter that it has “no legal duty” to take a particular action. However, that defense may be better and properly deployed by instead stating affirmatively that the business is in full compliance with statutory requirements or regulation. At the initial pleading stage, it may even be advisable to omit certain defenses where they are not required. Including them simply discloses your upcoming strategy to your opponents. In virtually every case, legal principles, including defenses and denials, can be stated in a way that makes the legal point without creating bad publicity that can harm the brand.

Minimize the burden on the business

As discussed earlier, while a business may be unaware of the daily legal tasks and strategic choices that make up litigation, they are often all too aware of the burdens of time and cost imposed on the business by major litigation. Litigation, especially major litigation, is a labor-intensive business and the hours required from company personnel, primarily with respect to discovery, are often underestimated. There are many steps that can address and minimize the burden on the business. First, expectations are important. As described earlier, education can prepare stakeholders for their roles and responsibilities for the litigation. Further, parties can and often do reach agreement on the parameters of discovery at the outset. Such agreements can define and limit repositories and custodians, as well as the mechanics and timing of production. If outside counsel has not raised this, you should inquire whether such agreements could be reached. In addition, in-house litigation managers can work with outside counsel to ensure that the discovery process proceeds with the greatest efficiencies by avoiding repetitive inquiries and making sure that discovery vendors, if employed, are competitively priced and highly competent.

Opportunities to resolve

Unless the litigation is the rare situation where there is absolutely no potential for resolution short of the court deciding it, most cases will be resolved by settlement. If that settlement can be achieved

early, massive attorneys' fees can often be avoided — and it is important to remember that attorneys' fees are almost never recovered. Setting the table for settlement is an art. The most important aspect of the art is convincingly communicating toughness and a willingness to continue the battle, while at the same time showing a common sense willingness to engage in reasonable dialogue. One of the most critical opportunities for settlement dialogue is at the outset of the case. Even as one is deploying a battle strategy, there is usually no harm in raising the prospect of resolution (in some cases, such discussion is required by rule). Potential settlement should be at the front of your mind throughout the litigation process. In many cases, mediation can be useful since there is often a certain resolution-oriented dynamic that happens, as well as additional creative pathways that emerge, just from having the parties face-to-face. However, it is important to hire a highly competent mediator (similar to the process for hiring outside counsel described earlier). You want someone who is sophisticated enough to understand the issues with a good work ethic and solution-oriented focus. You do not want a mediator likely to embolden your opponent, especially with ill-informed and ill-advised opinions about possible outcomes.

Likewise, it is helpful for in-house counsel to have direct settlement discussions apart from outside counsel. In some cases, that helps preserve the tricky tension between "ready for battle" and "willing to resolve" by separating the people talking about settlement from those doing battle. In other cases, direct discussion can cut through some miscommunication issues that are endemic to what can sometimes be a game of telephone; that is a process where the client talks to their outside lawyers who then talk to other outside lawyers who then talk to their client. I have favorably settled cases based on cutting through this issue alone.

Discovery compliance

Paying careful attention to process and compliance, including issuing and updating proper litigation holds and creating and implementing discovery protocols, is essential to minimizing burden and maximizing efficiency. But it is also critical because there are very specific requirements governing discovery set forth in the rules of civil procedure. The penalties for discovery mistakes, even short of overt misconduct, can be draconian. Failure to properly preserve documents can, in itself, result in an adverse outcome. It can also result in severe financial penalties to the company. While you certainly can and should depend on outside counsel to inform you of the proper legal path with respect to preservation and discovery, it is essential at the outset that you understand your responsibilities and work with outside counsel to set up a process to ensure compliance.

Learn from litigation

Every litigation matter should be formally reviewed at close to assess what can be learned from it. Should a form contract or lease be changed? Is there a loophole to close? Is there a process improvement that could prevent or improve outcomes? Should you revise your privacy policies, data retention policies, or terms of use? This is especially valuable with repeat litigation. Too often people are so happy for their victory and/or relieved that the matter is closed that they are anxious to move on. But it is important to ask: What can be learned from the experience to avoid claims or strengthen your position in future disputes?

Litigation management is complex, time-consuming, and requires an investment in capable human resources. Failing to properly manage litigation, however, is much more costly. It will result in increased expense and burden, but also cause potential harm to the business and brand. Ideally, litigation should be managed in-house by someone with deep familiarity with the business and

significant litigation expertise. If you have continual litigation, bet-the-company litigation, or repeat substantial matters, it is worth the investment to hire permanent in-house litigation counsel. For a standalone single important litigation, this could also take the form of a qualified consultant. Short of that, it is nonetheless absolutely imperative to have someone familiar with the business and independent of outside counsel closely overseeing the litigation. Even if that person does not have specific litigation expertise, they should still be closely watching the budget, participating in strategic decision-making, reading the pleadings and substantive correspondence, attending depositions, and regularly asking about the overall game plan and opportunities for settlement. Under all circumstances, litigation is expensive and having made, or being required to make, that investment, it is in a company's best interest to closely manage the investment to a successful outcome.

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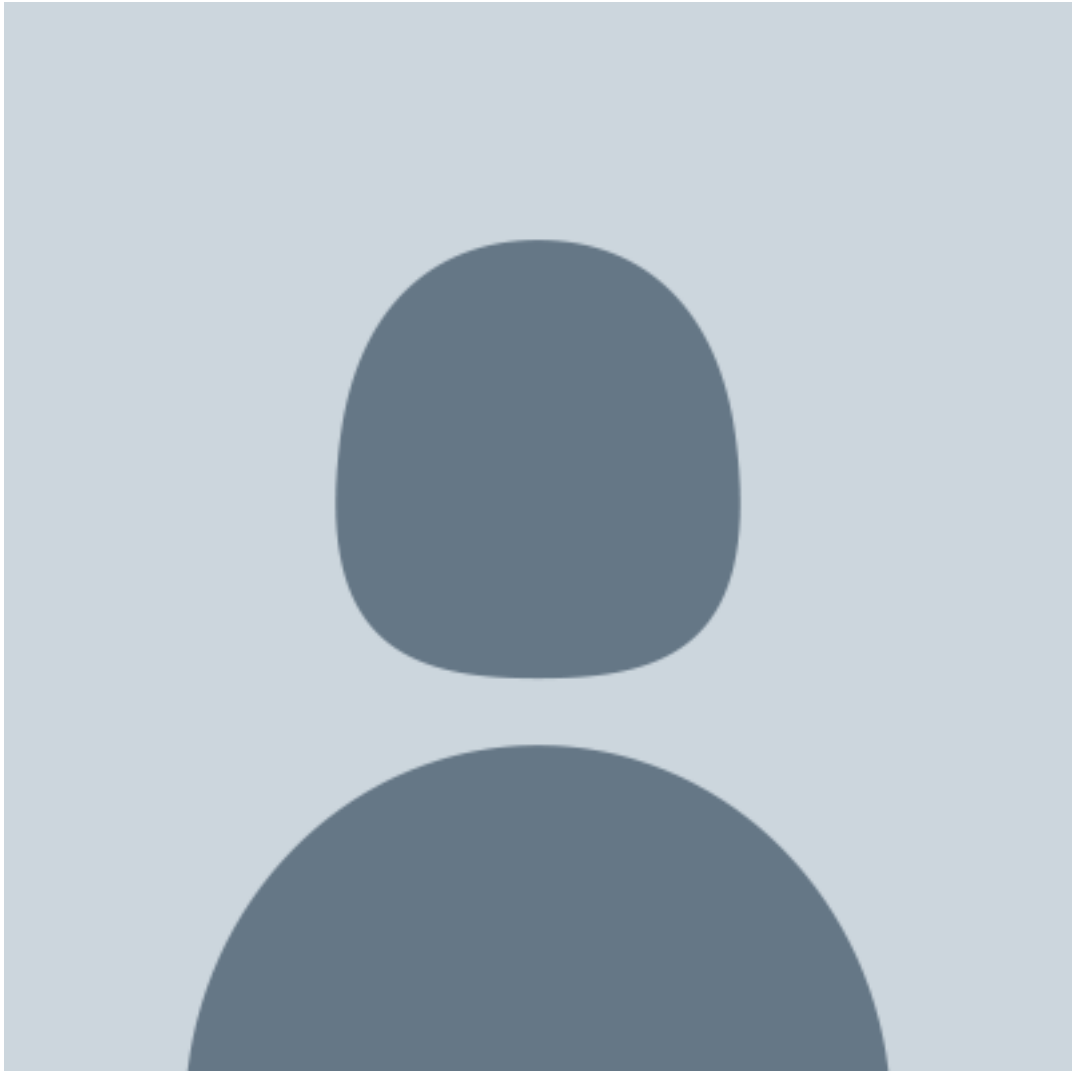

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