LawTrends

A publication of Eastman & Smith Ltd.

EASTMAN & SMITH LTD.
ATTORNEYS AT LAW
Established 1844

June 2010
volume 8 number 2

Preparing For and Surviving Business Litigation

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Most business owners hate litigation. They view it as a costly, drawn-out process that seldom produces the results they really desire. Unfortunately, despite their lawyers' best efforts, their assessment often can be quite accurate. If that is so, you might ask why get involved in litigation at all? The answer is that the need to initiate or defend litigation may be thrust upon you whether desired or not.

That situation can arise when you or your company have been named as a defendant in a lawsuit. Even though you have not initiated the lawsuit, now that you are faced with it, you have to present an appropriate defense. Not doing so will allow the plaintiff to obtain a default judgment against you and possibly preclude you from ever raising your defenses, no matter how righteous. And, in the event you are sued, you are required to raise certain counterclaims in response or you may lose the claims forever.

That situation also can arise when the stakes are too big not to do anything. Certain harms to your company from breaches of contract or other wrongful conduct may just be too important not to seek a remedy. For example, if another company's breach of contract costs you your largest client,

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doing nothing may not be an option. Likewise, you may have to pursue another party for damages caused by a catastrophic tort.

Accepting the inevitability of some litigation for most businesses, how can you prepare for that eventuality before an actual lawsuit is filed? There are several things that every business owner can do to be as prepared as possible:

1. ***Keep good records.*** Being able to provide your attorney with an organized set of records relating to a given transaction can save precious time and money at the beginning of litigation. The best practice is to keep those records organized along the way so that if something goes wrong, the file already exists. Having various documents on various matters all piled together on a desk is a recipe for disaster when the time comes to pull the right documents together. And not being able to locate critical documents may well result in adverse evidentiary rulings by the court that could be avoided by keeping track of the documents from the beginning.

2. ***Keep the right records.*** The documents that you should keep consist of any contract documents (i.e. the RFP, the quote, the purchase order, the invoice and the underlying agreement, if any exists in writing); communications (letters, faxes and e-mails); any reports, notes or memos written about the matter (including witness statements); and any photos of the subject matter of the suit, if such exist. With regard to e-mails and other electronic data, beware accidental deletion. Virtually every court now imposes a duty on the parties to take reasonable steps to preserve e-mails and other electronic evidence once they become aware of a lawsuit or the potential for one. Consult your lawyer about this early in the process to avoid any problems.

3. ***Make sure your written communication is accurate.*** As a dispute unfolds, the parties almost certainly will exchange written communications, either electronically or otherwise. When doing so, make sure your communications are accurate and not overstated. If you send a letter or e-mail making a demand, state your demand and the basis for it in a factual way. Avoid hyperbole. In responding to a demand, the same rules apply. Written communication that is inaccurate or exaggerated only provides ammunition for cross-examination by the other side's lawyer later. (One more cautionary point: Many people are less careful in writing e-mails than letters. Avoid that tendency at all costs. An errant e-mail can haunt you as much as a letter.)

4. ***Keep track of your witnesses.*** This is easy for witnesses in your immediate employ, but becomes more difficult when witnesses are former employees or third parties. Again, you can save precious time and money by keeping track of who these people are and where they can be reached from the beginning. Otherwise your lawyer will spend both time and money finding them.

5. ***When you smell trouble, call your lawyer.*** Most business people have a sense of which deals will go south. When you have that sense, call your lawyer to discuss the situation and evaluate what you have done, what you are doing and what you should do going forward. Again, being proactive at the beginning can save money in the long run.

6. ***Keep a diary of the problem.*** If you get the sense that things are going wrong, create and maintain a diary of the problem for your lawyer. Go back to the beginning with dates, times, people and the relevant events. Then keep adding to it as events unfold. Err on the side of including more information, not less. The diary can be very helpful to your attorney in framing demand letters, court pleadings or other necessary documents.

7. ***Tell your lawyer everything.*** Your lawyer will be most effective when he or she has all the facts, both good and bad, sensational and mundane. Filtering what you tell your lawyer never helps. Remember that your conversations with your lawyer are privileged from disclosure to the other side so you can and should speak freely. Even if there are "bad" facts, your lawyer needs to hear about them sooner rather than later -- and hear them from you, not the other side.

Once you are actually in litigation, there are four more things you can do to navigate the process:

1. ***Keep telling your lawyer everything.*** Keep communicating with your lawyer. If you have a question, ask it. If you think of something new, tell your lawyer. If you don't agree with your lawyer, say so. More communication is better.

2. ***Always be open to reasonable settlement possibilities.*** The one resolution you have the most control over is a negotiated one. A negotiated settlement is a resolution crafted by the parties. By definition, it will be a compromise resolution, but you will control it. You cannot control a judge or a jury and neither can your lawyer. Your lawyer will make the best arguments possible for you, but ultimately a judge or jury will decide the case. Don't dismiss reasonable settlement opportunities out of hand.

3. ***If called to testify, tell the truth.*** If you are called to testify, your lawyer will help you testify effectively and prepare you for cross-examination by the other side. But, your lawyer will not want you (or any other witness) to do anything except tell the truth. Period.

4. ***Be prepared for the discovery process.*** This may be the part of litigation business owners find most annoying. Discovery is the opportunity for the parties to ask the other side for documents, information and testimony. Most parties already see their matter as fairly straight-forward so the discovery process seems to be a waste of time and money. Feel free to express your frustration, but also remember that the law requires the process and your lawyer is trying to use it to further your case, not to make your life miserable. Part of your lawyer's job is to examine all of the evidence, looking for hidden pitfalls and buried treasure. He or she also wants to have enough information to reasonably evaluate settlement options along the way. Discovery enables him or her do so.

None of these tips is likely to make litigation your favorite experience, but they will help you get through the process more easily and, hopefully, more successfully than otherwise would be the case. Keep these points in mind when you face the potential for, or the reality of, litigation and talk about them with your lawyer.

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