

Ten Things You Absolutely, Positively Need to Know When You Get Sued

Gain perspective to make smart decisions

It's one of those unanticipated business problems. The cost of dealing with it can be overwhelming. The risk of loss to you and your business is huge. While you are in the middle of managing e-commerce operations, sales, billing, advertising, fulfillment, and the day to day challenges inherent in operating a business, in walks the local sheriff, a US Marshall, or a private process server and delivers you a thick stack of papers. A lawsuit!

Let's put some perspective around the process of resolving a lawsuit. If you really want to make smart decisions, consider the following guidance.

1) Don't go into default.

A response must be filed to a lawsuit or you go into default and a judgment will likely be entered against you. The time period, which varies by state and court, runs from the date you were served. Don't assume you know the date you were served, or that you can calculate the time period to file a response. The day you checked your email or P.O. Box and found a copy of a lawsuit may be the effective date of service of process.

2) Don't minimize the situation.

A lawsuit can be for money and/or other relief such as an injunction prohibiting you from doing something. If a money judgment is taken against you, it can be collected from your assets and future earnings. Many defendants contact me under the mistaken impression that they are "judgment proof." Don't make assumptions. Understand all of the implications that could ensue if a judgment is taken, particularly in light of the new bankruptcy law that makes it much harder to start over financially.

3) Disclose all the facts.

Lawyers need the good and the bad. Not giving your attorney all the facts from the start handicaps his ability to handle your case and this harms you. Sometimes your lawyer will need to go down a path that requires an understanding of online law and business. The time invested up front in figuring the situation out will be time well spent and worth the money.

4) Do not go directly into litigation.

Filing a legal response may ultimately be the wisest option available, particularly if you are going to file a counterclaim, you want the court to decide an issue, or you know the plaintiff cannot afford to litigate the case it filed. But there is generally plenty of time for your lawyer to get up to speed on the facts, go to the other lawyers, get an extension if necessary, and try to work it out through negotiations. Never ignore or overlook this option.

5) Negotiate only from a position of strength.

Strength takes many forms. It may be that your lawyer can show that any judgment would be uncollectible, and therefore going forward would be a

waste of money by the plaintiff. Perhaps the potential cost of litigating a matter against a top notch litigator scares the plaintiff off. And if your lawyer can identify and argue the law as it applies to the online world, show that you have a good chance of winning, and argue that the plaintiff may have to pay everyone's lawyer fees, then that certainly creates a position of strength.

6) Be realistic.

If you believe that principle really matters, think again. If you contact the plaintiff's lawyer, your plea for justice will likely be ignored. There are some lawyers out there who actually will listen to you and consider what you have to say; while many more will use everything against you and try to get admissions from you that will make their job of winning easier.

7) Follow directions.

Do what your lawyer suggests. Don't send emails about the lawsuit within your company or to any third parties. These are discoverable and often damaging. Don't destroy anything or allow a document management process that deletes information to continue unabated. From the moment you receive the lawsuit, or even a notice of the possibility of a lawsuit, you have certain obligations concerning evidence, documents, electronic data, and the like. "Spoliation" of evidence is bad news.


8) Understand the costs.

Litigation is expensive. Cases can cost six figures in lawyer fees, and more, to take to trial. Law firms won't generally extend credit to you unless you pledge collateral to cover fees or are a very healthy and prominent company. In considering your options, understand that one of the worst things you could do is begin to defend the case and then run out of funds to carry on. You are not in a position of strength at that point.

9) Know your opposition.

This is critical. Make sure you and your lawyer know the company on the other side suing you. Know the lawyer representing the plaintiff. This means gathering intelligence on both to favorably position the matter. Venture funds or investors will shy away from investing in a company with a significant counterclaim pending against it. If opposing counsel has never tried a case, chances are a trial is not his end goal.

10) Remember that the best defense is a great offense.

If your lawyer cannot settle the case, make sure he is aggressive and ready to go on the attack. This attitude will come through even in settlement negotiations and could improve your chances of settlement. Ask the lawyer the number of "first chair" trials he has actually taken to jury verdict. Attorneys can smell fear. Consequently, your best settlement will be when the lawyer on the other side is scared to try a case before a jury, and your worst settlement will be when it's your lawyer who is scared to go to trial. 



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