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So You've Been Sued: What Now?

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I. Introduction³

“Avoid lawsuits beyond all things; they pervert your conscience, impair your health, and dissipate your property.”

~Jean de la Bruyere

It’s going to happen. Sooner or later, it’s going to happen. It may not be right, it may not be fair, but it’s going to happen.

If you are in business for long enough you are going to find yourself in a lawsuit. Whether in state court, federal court or before an arbitration panel, litigation can be expensive, time-consuming and unpredictable. But there are steps a business can take at the outset to increase the chances of a favorable outcome—or to at least decrease its chances of a disastrous result. This paper discusses those steps.

The paper focuses on the lessons learned from the authors’ combined fifty years of experience of litigating various types of disputes in various places before various tribunals. For the most part, we offer practical suggestions, not legal obligations. But we throw in a little bit of law here and there too. For those readers who themselves have experienced litigation, we would welcome your comments about what you wish you’d known or done when you were first sued.

II. Circling the Right Wagons: Defining Your Inner Circle

“All battles are fought by scared men who’d rather be someplace else.”

~John Wayne as Captain Rockwell "Rock" Torrey in In Harm's Way

Early on you need to determine the team members that will be responsible for gathering the facts and determining the legal strategy. That team will obviously need to include in-house counsel, if you have one. In a business dispute—and in a company with a large enough legal staff—the team may need to include a transactional lawyer who

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³ The authors did their best to accurately state the law in this paper. The reader is advised, however, to conduct independent research before relying on any of the law in this paper.

represents the business segment involved as well as an in-house litigator. It will also need to include the business people knowledgeable of and responsible for the relationship that is now in dispute.

In gathering the facts you want to cast a wide net to make sure you have talked to and gathered documents from everyone that might have relevant information. But you want to cast a much smaller net in assembling the team that will participate in privileged communications about the strategy of responding. Only the decision makers for the business unit involved should be included in the strategic communications. Lower-level employees may have valuable factual information, but they may also have longstanding relationships with the other side and might have difficulty knowing which communications can be shared and which can't. The more people that know something the more likely it is to be disclosed—either inadvertently or intentionally—to someone who shouldn't know it.

In this day of group emails, it is all too easy to start an email string simply seeking factual information and then, with the ubiquitous “reply all,” suddenly privileged communications are being shared with those who don't need to know them. In-house counsel should take great care at the outset in determining who should receive privileged and strategic communications and instructing members of that group not to share them with others, even those with whom they are communicating to get facts and information.

Another key decision is when to engage outside counsel. That decision, of course, will depend, in part, on the litigation capabilities of the in-house legal department. And the following may sound like a self-serving suggestion. But even when the in-house legal department has litigators, you should consider obtaining the independent assessment of an outside litigator at an early opportunity. In-house counsel have relationships with their clients that may make it harder for them to objectively assess the risk or call a spade a spade when determining if someone has behaved improperly.

And, unless the in-house litigator is actually going to try the case, it makes sense to bring in the outside counsel who will try the case at an early stage so they can have a role in assembling the data and determining the strategy. Positions taken with the opposing party early in the dispute can hamstring trial counsel later on if she and the client determine that a different position is more viable.

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