

So your business has a legal problem. . .

Eight useful tips on getting legal advice and what to expect from your lawyer

Igor Ellyn, QC, CS and Orié Niedzwiecki
Ellyn Law LLP, Business Litigation Lawyers, Toronto
www.ellynlaw.com

As a business owner, you are usually run off your feet with the challenges of operating your business. The last thing you need to worry about is a legal problem. Many business people put off dealing with a legal problem because they don't know where to turn, don't have the time, or most often, are afraid of how much it will cost and how much time it will take.

Legal issues come in many forms:

- A customer failed to pay an account despite many promises.
- You just received a letter from a government agency.
- You just found out that your former manager has set up a competing business and has stolen your best customer and one of your key employees.
- You have just been sued.
- Someone told you that one of your standard form contracts won't stand up in court.
- You have a dispute with your landlord.
- You have a problem with a US or European customer.
- Your business has been defamed on the internet.
- You just found that your warehouse manager has been sexually harassing a female employee.
- An employee is damaging your business and threatens to sue you if you fire him.
- You are involved with a Workplace Safety Insurance claim.

These examples are just the tip of the iceberg of the kinds of legal issues business people run into frequently.

Tip #1 – Seek out legal help at the first sign of a problem

Suppose a competitor has been passing off its business under your name and it's costing you customers and sales but it's hard to estimate the amount. Unless you act promptly, it may be too late to seek an injunction from the Court. If you think you have a claim against another party under a contract, a limitation period begins to run from the time the contract is breached and usually expires two years later. It's not a good idea to leave the claim to the last minute.

If you have an issue with an employee who is working unacceptably, it's important to develop a legal strategy as early as possible. The longer you wait, the more it may cost your business.

The short point here is that it is important to seek advice as soon you detect a problem and before anything has been done to make it worse. Crisis management is always more expensive and time-consuming than early response.

Tip #2 – Have a team of lawyers to call on when you need them.

Every business should have a team of on-call lawyers. This is less expensive or complicated than it sounds. All you need are the

telephone numbers and email addresses of trusted corporate, employment law and litigation lawyers. Depending on the nature of your business, you may also need an intellectual property lawyer, who deals with trademarks, patents and copyright. You may even need a tax lawyer because not all tax issues can be solved by an accountant.

If the amount of your legal dispute is very small, such as a claim or complaint by a customer for \$1,000 or less, it will be uneconomic to hire a lawyer. Fortunately, there are other helpful resources. The BBB has a dispute resolution process which permits BBB businesses and their customers to resolve disputes by arbitration or mediation. You don't need a lawyer and the only cost is a small administration fee. More information about this process is available on the BBB website.

If your case is in the Small Claims Court (\$10,000 or less), you might need a paralegal who specializes in these kinds of cases. Paralegals are now regulated by the Law Society but they are not lawyers and they are not a substitute for an experienced lawyer.

Tip #3 – Learn what to expect when a dispute arises.

As a business person, you have learned that success is often the result of building relationships. The relationships you build with your professionals can be just as important to your business success as the ones you have with customers and suppliers. A relationship with your lawyer built on mutual trust and respect will save you many sleepless nights over the years and probably make or save you a lot of money.

There are several ways to find good lawyers for your business:

- Ask business associates or relatives if they have someone to recommend. If you get a recommendation, find out more about the firm and the lawyer by using some of the research methods below.
- The internet is a very useful resource for finding a lawyer but you have to be careful. Any lawyer can list with various online legal directories. Anyone can have a flashy website. You have to move past the flash to find the substance.
- When looking for a lawyer on the internet, look for someone who has experience in the field you require. The first name on a Google search may not be the best choice. Some lawyers have written extensively about the law. This is a useful indicator of expertise and standing in the legal community.
- Some lawyers list cases they have been involved in on their websites. Broad litigation experience in complex business matters over many years is a good indicator of competence.
- The Law Society of Upper Canada has a lawyers' referral service. The service provides a name but you have to check the details out yourself.
- If your problem is outside Ontario, find an Ontario lawyer first. Many firms have networks with lawyers globally and are able to refer to lawyers in the USA or other countries.

When you call, don't expect the lawyer to solve your business problem over the telephone. The first discussion is for the lawyer to identify whether s/he can represent you and for you to assess whether the lawyer appears to have the skills to deal with your problem. If you have a legal problem the lawyer believes his/her firm can resolve, an office meeting will be arranged.

In a business matter, it is customary for the lawyer to charge a consultation fee for the first office meeting. At the consultation, the lawyer will give preliminary or urgent advice and develop a go-forward strategy. The lawyer may be able to give a partial fee estimate and ask for a retainer for further work. The lawyer cannot guarantee the outcome and at this early stage, there are probably still a lot of unknown factors. While the lawyer may be able to give you a partial fee estimate in a litigation matter, it's impossible to say with accuracy how much it will cost. It depends on too many unknown matters.

At the end of the meeting, you will have to decide whether to hire the lawyer to represent you further. The decision you make will depend on your sense of confidence in the lawyer. Has the lawyer listened to you? Have your questions been answered? Does the lawyer appear to understand your problem? Has the lawyer presented the risks and downsides of your case? Every case has risks, costs and downsides. Beware of a lawyer who tells you only what you want to hear.

Some lawyers will accept a monthly or annual retainer which entitles the client to telephone advice a few times a month. More complicated issues require separate engagements.

Tip #4 – The least expensive lawyer may not be the person to handle your particular legal problem

Consider this scenario: you are looking for a lawyer for a complicated lawsuit. You call Mr. Jones, who answers on the first ring. You tell your story, which has many facts the opposite party disputes. Mr. Jones says, "You have a great case. I'm sure you're going to win." When you ask how much it will cost, Mr. Jones says "Don't worry, you won't have to pay me anything unless you win. Just come on down to my office and we'll get started."

Beware of any lawyer who tells you this. While Ontario lawyers are permitted to charge their fees based on contingency, i.e. a percentage of the result, this type of fee arrangement is only rarely applicable in business cases, where facts are often in dispute and recovery is uncertain.

When you retain a lawyer, you need a trustworthy advisor, who will point out the weaknesses of your case as well as the strengths. A litigation lawyer who is waiting by the phone for your call and tells you exactly what you are hoping to hear may be too hungry or too inexperienced to manage your case. He may soon be in over his head and will bail out as soon as your case takes a negative turn. By then, your legal situation may have worsened. It will be more expensive and perhaps impossible to repair it.

Even worthwhile cases require careful analysis and risk assessment. An experienced litigation lawyer will typically do this by charging on an hourly basis plus GST and any out-of-pocket expenses necessary for your case.

Good litigation lawyers are often in court, at mediation or other litigation procedures, at meetings or discovery. However, good litigation lawyers always call or respond by email within 24 hours. In case of urgency or vacation, the lawyer will arrange for someone in the office to contact you.

Tip #5 – Prevention is better and much less expensive than litigation.

Legal problems are like computer crashes --- they are bound to occur, it's just a matter of time. Unlike computer crashes, some lawsuits can be avoided. Often, businesses owners deal with legal matters only when a crisis arises. They look for the least expensive lawyer to draft their leases, contracts, corporate and employment agreements without regard to skill, competence and experience.

Sometimes, business owners avoid legal steps like failing to make a shareholder agreement, failing to file a trademark application or failing to prepare a non-competition and non-solicitation agreement with a key employee. These business owners will be caught short when the inevitable occurs. While litigation or arbitration may still occur when there are written agreements in place, you will be in a far more secure position if you have taken precautionary steps before the dispute occurs.

Competent legal advice is available for matters such as corporate organization, leases, the wording contracts and other documents you use in your business, partnership and shareholder agreements, your relationships with your employees, your company's trade names, logos and website, your regulatory compliance, your risk management and litigation prevention techniques. It's all important to arrange legal affairs to ensure that your personal liability is limited in the case of a claim against your business.

Ensure that the legal issues affecting your business are in good order. This is likely to save you a lot of money and grief in the future. You might even consider having a legal audit or a "business legal checkup". We plan to write about this topic in a future article in this newsletter. Preventative legal advice may be expensive but it is just as important as fire insurance.

Tip #6 -- Don't assume that 'going to court' means 'going to trial'

If you haven't been involved in litigation before, you may not appreciate that more than 90% of cases settle before trial. While a trial (or even an appeal) is not always avoidable, lawyers use techniques to try to resolve cases at earlier stages. Business people are looking for certainty and to limit expense and exposure.

It's never a bad idea to negotiate a settlement with the opposing party but the timing and approach will depend on the case. It is best to negotiate from a position of strength. This may mean holding off negotiations until enough facts and documents have been disclosed to favour your position.

Mediation is another technique lawyers use to achieve settlement before trial. Mediation involves a neutral mediator, who is usually an experienced lawyer, acceptable to all parties. The parties and the lawyers prepare briefs to explain their positions to the mediator. On the mediation date, after an opening session, the parties retire to separate rooms. The mediator will "shuttle"

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between the parties until an agreement is worked out or an impasse is declared. This process produces a high rate of settlement even in very complicated cases.

Tip #7 – Appreciate the risks of the litigation process: Why do lawyers emphasize settlement?

Even if you have an airtight case, your lawyer will still recommend settlement. Lawyers assess risk every day. Even the most airtight case could have problems at trial. The judge may prefer the evidence of the opposing party over yours. The other party's expert witness may be more persuasive than yours. These are just two of many possibilities. A trial is always a last resort.

Another good reason to settle is that even if you win at trial, the case may not be over because

- the legal costs awarded by the court to a successful party are only a partial recovery of the legal costs payable to your lawyer.
- if you lose at trial or if the opposing party does better in court than their settlement offer, you will have to pay a portion of their legal costs.
- there may be an appeal which could delay payment for two years or longer.
- until a final judgment is granted, a defendant is rarely prevented from dealing with his property – unless the property is the subject of the lawsuit (or some other exceptional situations).
- the judgment may be unenforceable. The opposing party may be insolvent or go bankrupt. You might not collect anything.
- the defendant may conceal his assets or transfer them to family members to make the debt difficult to collect. A separate lawsuit may be necessary to find the defendant's assets or to declare the fraudulent transfer void.
- the defendant may have assets outside Ontario. A lawyer in the jurisdiction where defendant's assets are located may have to be retained to collect the judgment.

A settlement involves a resolution both parties can live with. If the case involves the payment of money, there won't be a settlement unless payment is made.

Even with these concerns, some cases can't be settled. The positions of the parties may be so far apart that a trial is necessary. As the case progresses, you and your lawyer will have to revise and update your strategy and estimate the legal cost and risk of each stage of the case. Keep in mind that the opposing party is dealing with similar risk assessment and cost issues as you are.

Tip #8 -- Be a good client.

From a lawyer's perspective, a good client is a business person who does the following:

- presents all the facts of the case fairly without exaggeration or deception. Tell your lawyer everything; not just the facts that help you. The rest of the story always comes out and usually with adverse consequences.
- considers the lawyer as a trusted advisor and advocate.
- has a well-organized set of relevant documents.
- provides other documents and information promptly when requested.
- accepts that every case has weaknesses and works with the lawyer to develop a strategy to minimize the weaknesses.
- recognizes that the lawyer cannot guarantee the outcome but can only provide effective advocacy to produce the best result, often as a result of negotiation or mediation.
- if an examination for discovery or trial is required, takes the time to prepare to testify.
- asks for clarification on all matters that are unclear.
- understands that in litigation matters, it is impossible to predict the fees accurately but the lawyer will provide estimates of imminent steps in the case.
- pays retainers when asked and settles interim accounts promptly when rendered.
- considers the lawyer's recommendations carefully and provides reasonable instructions..

These tips are no assurance that your case will turn out exactly as you expect. However, by following our suggestions, the resolution of your business dispute is likely to be a less expensive, less time-consuming and less stressful experience. If your legal affairs are in good order, you'll be able to focus on what you do best --- making your business flourish.



Igor Ellyn, QC, CS and Orië Niedzviecki are partners of ELLYN LAW LLP Business Litigation Lawyers, a Toronto law firm specializing in dispute resolution for small and medium businesses and estate litigation.

Igor Ellyn is a Specialist in Civil Litigation and a past president of the Ontario Bar Association, who has practiced as a business litigation lawyer for more than 30 years. He is a chartered arbitrator and mediator and the author of several legal articles, some of which may be downloaded from the firm's website.



Orië Niedzviecki has practiced as a business litigation lawyer for 10 years. His practice includes commercial disputes, employment law, construction litigation and estate litigation. He is also admitted in the District of Columbia, USA.

For more information, visit www.ellynlaw.com.

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