

Getting sued

How to make the litigation process easier and less costly **Interviewed by Heather Tunstall**

No business owner starts each day thinking that his or her company will be sued. Preparing to avoid a lawsuit isn't on most owners' to-do lists, but it's a risk that should garner their attention — a reality of running a business is that it's always a potential target.

"The statistics say that about 70 percent of all businesses in the United States find themselves engaged in litigation every 10 years," says Richard L. Charnley, a partner at Ropers Majeski Kohn & Bentley PC.

Smart Business asked Charnley for tips on what to do if a company is sued and how a company can be prepared by taking appropriate preventive measures.

What are common reasons that a business may be sued?

Commonly, businesses make the mistake of not having well-drafted employee handbooks or a set of company guidelines regarding Internet usage. Problems occur when companies use items off the Internet without getting permission. Companies become involved as defendants of litigation for using someone else's artwork or logo and violating the intellectual property rights that belong to third parties. It's very difficult for companies to manage the issue because their employees, looking to come up with a new design or competitive edge, regularly use the Internet for inspiration. Management relies on the employee's 'new concept,' runs with it and somewhat innocently broadcasts it to the public. Then, suddenly, the owner of the original art files suit against the company for violating a trademark or infringing upon a copyright. Well-drafted handbooks and guidelines addressing Internet use can help businesses to avoid this.

What steps can a company take to avoid lawsuits, or make litigation easier should it occur?

Sometimes when a claim arises, there is a tendency to make light of it or to not deal with it straight away. Many lawsuits could probably be avoided if someone simply called the offended party, admitted to making a mistake, apologized and offered to discontinue the offending practice. It makes a difference to have someone in the chain of command in the company — for example, the president — make the call. People may file lawsuits because they think of companies as just being big nameless entities. Picking up the phone and calling someone who has a claim or a pending claim could eliminate the problem.



Richard L. Charnley
Partner
Ropers Majeski Kohn & Bentley PC

Don't lawyer up right away and try to keep it on a personal level, but scripting the message with input from counsel is advised as long as the message is not too 'legalistic.'

When preparing for an anticipated lawsuit, business owners need to be aware that the current 'big issue' is electronic discovery. In any modern company, there are internal e-mails, people going on the Internet and a lot of outside e-mails coming through. There is a disturbing tendency for e-mail, especially inside a company, to be casual and inappropriate. But, regardless of content or source, almost all e-traffic is saved somewhere and its public release can be damaging and embarrassing. When a business is looking at a claim, a memo should go out to everyone that could possibly be included in the e-mail or e-traffic chain simply reminding them that everything that ends up in the e-mail rotation can eventually be discoverable. Businesses should make sure that all of their electronic data and electronic information is properly secured and not destroyed. A company can face serious financial sanctions for deleting electronically stored information.

What should a company do if it is being sued?

Lock down the house — Take charge of all the electronic data, the e-mail, the voice-mail, anything that can be stored on a computer. Make an assumption that it's going to end up being discovered and reviewed by an

opponent. And, once again, advise everyone that all e-mail and computer generated documents can be obtained by the 'other side.'

Tender the claim — One thing to keep in mind is tendering the lawsuit to the business's insurance company. Insurance policies oftentimes cover a variety of risks that executives may not understand or may not recognize. Risk managers understand what is in an insurance policy and what is covered, but not all companies employ risk management professionals. Insurance is an old business. There are all sorts of insurance companies and all sorts of policies, and insurance language is often difficult to interpret. As a result, on first impression, some people assume they are not covered for a particular claim. It's important to tender to every conceivable policy in order to potentially save hundreds of thousands of dollars in attorneys' fees.

Horses for courses — Really consider the choice of lawyers and conflicts of interest. There is a tendency for a defendant business owner to pick up the phone and call a trusted business lawyer and send the case to the 'go-to firm.' But, instead of immediately sending the case to the business lawyer, a better approach is to meet with that lawyer to explain the particulars of the case. A good business lawyer will know when it is important to bring in a litigator, and he or she should be able to provide a referral to the right lawyer for the case. An important consideration here is the impact of 'hometown advantage' — the benefit of retaining local counsel that speak the language of the people and judges in the area.

Benefits of quick disposition — Early mediation is an option that is too often overlooked. Some lawyers don't like the risks of early mediation. For example, in the first 30 days after you've been sued, a defendant really may not know much about the other person's case. The concern here is that mediating or settling too soon may result in the defendant giving away too much money. Oftentimes, however, attorneys' fees and an untold amount of time can add up to more than what either side would have spent with early mediation. There are ways to set up an early mediation to try to get a case settled and still protect the business's interests. The reality is that every case will eventually be sent to mediation before moving to trial. For business owners and management, why not explore settlement early, take a shot at resolving the dispute and get back to running a successful company free from the burdens of litigation? <<

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