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How to Avoid Litigation

"The first thing we do, let's kill all the lawyers." Shakespeare, Henry VI

Meeting new people at a cocktail party and telling them that I'm a lawyer frequently generates a scowl. The experience that most people have had with lawyers is in connection with their divorce or a lawsuit. In either case, it was rarely pleasant and usually very expensive. I explain that I don't sue people. In fact, among my primary goals is to help my clients avoid litigation.

As a transactional commercial lawyer, I assist my clients start new businesses, strategize and structure their business deals, draft and negotiate contracts that reflect their business goals and advise them on how to comply with applicable laws and regulations.

Although litigation cannot always be avoided, the following steps may reduce your chances of being involved in litigation:

1. Initially and most importantly, evaluate the company or person with whom you will be dealing. Check his or her background, reputation, credit and litigation history. *The best way to deal with a "problem" person is to avoid dealing with him or her.*
2. Second, have a clear understanding of the agreement between the two of you, *including all material terms*. A clear mutual understanding of the deal and managing both parties' expectations are critical. Once you have arrived at a deal, have all material terms clearly written in a contract that is signed by both parties. Do not sign a contract that includes terms you don't fully understand. To reduce the possibility of future litigation or liability from that litigation should it arise, you should seriously consider consulting a lawyer to prepare or review your contract. A lawyer is able to identify the material terms, have the contract clearly state what you agreed upon, provide contingencies for how to proceed should a dispute arise (for example, provide for mediation or arbitration, rather than litigation, to keep down costs and obtain a quicker resolution) and explain provisions that you don't understand.) *Most disputes and litigation arise from misunderstandings, lack of communication and unreasonable expectations.*
3. If a dispute arises, don't immediately get agitated. Think and act logically and reasonably. Review the facts. Don't take the dispute personally. Put yourself in the other party's shoes and try to understand his or her viewpoint. Review the contract to determine whether the contract addresses the facts or issues. *You may find that it is you, not the other party, who is not complying with your original agreement.*
4. Talk with the person with whom you're having the dispute. Although it is common practice today to communicate by e-mail, there are pros and cons in doing so; sometimes a good result is best achieved by a face-to-face meeting or a telephone call. Prepare for the conversation by gathering pertinent facts and documentation, outlining the issues, your positions and potential solutions, and by anticipating the other person's substantive responses, so that you are reasonably prepared to respond to them. Your approach and communication style should generally be cordial, not antagonistic or contentious. You are more likely to achieve a better result through an affable, cooperative approach.

5. Hopefully the dispute can be resolved by a mutual understanding of the others' positions and needs and mutual agreement to a win-win solution. *Although parties' starting positions may be in conflict, each party's actual needs frequently are not in conflict and an amicable win-win resolution can be achieved.* Even if the parties' actual needs are in conflict, a reasonable resolution may be achievable through compromise.

6. If the dispute has not been resolved amicably, you must decide what your next step is. The alternatives available will vary depending upon the facts and context. However, *it is important to determine and fully consider each of the available alternatives, as well as the practical, political and legal consequences of each alternative.* You might consult a lawyer at this time to advise you of your rights under the contract, help you determine and evaluate your alternatives and advise you of the legal consequences of each alternative.

Hopefully, however, you can achieve an acceptable resolution to your dispute by utilizing the above strategy, as your best option is not to win in litigation, but to avoid litigation.

Susan E. Wells is a partner with the Phoenix law firm of Wells & Gerstman PLLC. Her corporate and business practice encompasses all aspects of business transactions and commercial relationships in numerous industries, including franchising and buying and selling businesses.

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