What To Do When You've Been Sued: How to Help Your Lawyer Help You

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"A jury consists of twelve persons chosen to decide who has the better lawyer."
-- Robert Frost

"The sheriff is here with papers for you," reports your secretary. You just got sued. The Complaint accuses you and your company of the civil equivalent of high crimes and other misdemeanors. Your first reaction is one of outrage. How dare they sue you? You feel personally and unfairly attacked. Your next reaction is one of disquiet or anxiety. You feel as if you've been snared in a costly game where you neither make nor know the rules. How this will affect your job, your company and your reputation? Will your company be held liable? How much will this cost?

These reactions and questions are common. Most business people have little familiarity with courts and litigation, and little inclination to spend time with lawyers. Lawsuits are expensive and time consuming, require attention and effort, and rarely add to the bottom line. Now with "papers" in hand what will you do? Ruminate? Decompensate? Circle the company wagons?

Relax. This is the first in a series of articles about things to consider should you be faced with this situation. These articles are intended to be a brief overview of the litigation process, with practical tips on how to handle some of the most common issues. We will discuss how to hire and work with a lawyer, what to expect from the process, some of the potential pitfalls and traps to watch out for, and how to get an optimum result.

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How To Select Your Lawyer

The first thing you want to do is make sure you have a good (or great) lawyer. Some people spend more time and effort researching the kind of TV or car to buy than the selection of a lawyer. They often take the first lawyer they find. This can be a mistake. Some people want good looking lawyers, like they see in the movies. Some people want mean junk yard dog lawyers so they can inflict maximum pain on the other side. There are numerous factors to look at. Consider whether saving time, looking good or inflicting pain will eventually add up to an optimal result.

The primary factors that sophisticated litigation clients look for in selecting a lawyer are intelligence, common sense, communication skills and experience. You should meet and interact with your lawyer in order to assess his or her intelligence and common sense. Practical problem solving skills are often more important in litigation than vast knowledge of legal intricacies. Another way to assess qualifications is to get referrals from business people you trust, or ask your potential lawyer for references.

Can your lawyer communicate to different people in different walks of life, such as a busy judge or a bored juror? Can they make a complex issue simple, understandable and interesting? If your lawsuit involves skilled adversaries, can your lawyer present your position in a persuasive manner? Positive communication skills can make the difference between winning and losing, between getting (or paying) nothing, a lot or a little.

Some would argue that you should only select a lawyer who has significant actual trial experience. Others would point out that actual trials are becoming quite rare and that there are many highly skilled attorneys who have not tried a case who can ably represent the needs of a business litigants. It is important for you, the client, to decide upon the nature and extent of experience you want in your

attorney. There are gifted trial "war horses". There are also gifted attorneys who have never "gone to the mat" who may be just right for your case. If trial experience is important to you, ask your potential attorney to give you their trial experience and whether the nature of your case is new to them. If you needed heart surgery, would you select a surgeon on his maiden operation or one with prior experience?

One of the pitfalls for clients in litigation is the lawyer who gives an overly optimistic picture at the beginning, spends lots of time and money in working up the case, and then changes his or her opinion to urge settlement on the eve of trial. Sometimes referred to as "the near trial experience", this can occur after thousands of dollars have been spent on litigation expense, including the payment of fees to your attorney. While even lawyers with extensive trial experience may change their opinions when confronted with new evidence, facts or witnesses, sometimes the fear of the unknown can influence a lawyer with no trial experience to urge a client to opt out rather than incur the risk of an actual trial.

Of course, there are many other important factors as well. Does your lawyer have knowledge and experience in this type of case? Whether it is a white collar criminal matter, a business dispute, or a construction defect claim, you may be better off with someone who knows the area. Do you want a big firm or a small firm? Some business clients feel that their needs can only be represented adequately by a large firm with substantial resources. Others have found great satisfaction when hiring a sole practitioner who has the skill and reputation necessary to prevail. In reality there is no one right approach. Large complex commercial cases are successfully handled by large firms, medium to small firms and sole practitioners. Sophisticated clients seek to hire a particular lawyer (who has the necessary experience) rather than a large or small firm. Finally, it is important to match the experience of your lawyer to the size of your case. Is this a routine case or a large exposure bet-the-company matter? The greater the exposure, the greater care should be used to pick your lawyer.

The bottom line is to find a lawyer who you trust, and who you can communicate with. After all, it is your case and your life, so you need to understand what is going to happen and be involved in the process.

> "Does your lawyer have knowledge and experience in this type of case?"

Making An Early Evaluation

Once you have selected your lawyer, you should ask for an early assessment of your case, along with an exit strategy on how best to resolve the case. There are numerous questions that are routinely asked by sophisticated litigation clients, and you should, too. What are the basic and critical facts? Is there potential or probable liability? What are the potential damages? Is this a small, routine case or are you betting the company? What is the possible upside, as well as downside, of the case? What are your options? Ask your lawyer to work through a risk analysis, including the likely success, cost and time associated with each option. If tried properly to a verdict ten times, how often would you prevail? Is this assessment based on experience, gestalt or some combination thereof? Should the case be settled or tried?

> "If the case is a good case for you, you may choose to fight."

Attorney's fees, expert expenses and other litigation costs should be discussed early to establish an estimated budget. You should endeavor to eliminate legal, emotional and financial surprise down the road, any of which can force your hand into an unfavorable settlement.

By asking these questions, you are seeking a realistic preliminary evaluation so that decisions can be made by you as to how to handle the case. If the case is a bad case involving potential exposure, then

you may want to try to settle the case early. If the case is a good case for you, you may choose to fight. If more information is needed to make an assessment, then you can decide what information gathering, or "discovery," will be done, and how much money will be spent on this. Some clients say, "Millions for defense, not a penny for tribute." Of course, lawyers like to hear this type of philosophical bent, but it is not always practical. Other clients feel that a dollar spent defending a case has the same value as a dollar spent settling a claim, and simply want the cheapest way out. Many clients fall somewhere in between, wanting to spend the necessary money to get a fair and satisfactory result, rather than just paying to settle. Whatever type of client you are, you will want to make an informed decision as to how to best handle the case, and whether to settle it or go to trial.

The Litigation Process

Civil lawsuits usually follow a predictable pattern, and can take two or more years to resolve. All parties file pleadings, which set forth their claims and positions. Information gathering, known as "discovery," then ensues, in which the lawyers seek to find out the facts and evidence. Discovery can involve sending written questions to the opposing parties, obtaining documents (such as emails) from parties and non-parties, and taking depositions (recorded interviews under oath) of parties and witnesses. Experts may be hired. Prior to trial, the court will encourage settlement discussions and/or mediation. If the matter is not settled, then a trial will be held before a judge or a jury. Following a verdict, any of the parties may appeal the final judgment, and the case will be sent to an appellate court for review.

Typically, civil cases take two to three years to get to trial in Hawaii, although some complex cases can take much longer.

In articles to come, we will discuss communicating with your lawyer, attorney's fees, insurance considerations, pitfalls and traps in discovery, the use of experts, depositions, how to be a good witness, settlement strategies and trials.

This article is intended to address issues of general interest, is not intended to be construed as legal advice, and does not take the place of consultation with qualified legal counsel.