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SO YOUR BUSINESS HAS BEEN SUED: NOW WHAT?

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The marshal or process server arrives at your place of business with papers. Perhaps they are delivered through your corporate services company or perhaps they arrive by registered mail. You look at the papers and realize that your business has been sued. This realization is undoubtedly disconcerting, particularly if you have been fortunate enough to avoid litigation previously. Now what do you do?

The first thing you should do is take a deep breath and relax. It is not the end of the world. The remainder of this article will outline some of the basic steps you should take when this occurs.

1. Do Not Procrastinate. All court systems have deadlines within which an Answer, Counterclaim or other papers must be filed in response to a lawsuit. Normally, these deadlines are between 20 and 30 days after delivery of the papers, but they vary. Typically, the front page (the summons) will specify when the papers have to be filed. If your company does not file an Answer in time, the court may enter a default judgment against it, meaning that it loses without a trial. But you do not have 20 to 30 days to wait, you need to be proactive and react *immediately*.

2. Engage Counsel. You will want to have the papers in the hands of counsel as soon as possible. If you have company counsel, forward copies of the documents immediately. If you do not have counsel, you will need to engage a lawyer. There are many ways to find a good lawyer. You can often get good recommendations from other business owners or trusted advisors. You might also ask attorneys you know for recommendations. If they are not a litigation attorney, they will probably still be able to make referrals.

There are other ways to research and find attorneys. Most lawyers and law firms have websites that include biographies of the attorneys. Check the attorney's experience in handling similar types of cases. Check the attorney's academic performance. Although strong academic performance is no guarantee that a person is a

good lawyer, it enhances the odds. The most prestigious law firms, large and small, tend to place a lot of weight on academic performance in their hiring decisions. Thus, if a lawyer graduated at the top of his or her class, was on the law review, and has other good credentials, it is positive piece of information, but is not necessarily determinative.

The Martindale-Hubbell Law Directory is a long-standing publication that lists most attorneys. Further, it is now available on line at www.martindale.com or its affiliate, www.lawyers.com. Martindale-Hubbell also rates attorneys on a scale of “AV,” “BV” and “CV.” AV is the best rating. Many lawyers are not rated, which does not necessarily mean anything other than that Martindale has not received enough feedback to rate them. As with all such systems, they should be taken with a grain of salt, but an “AV” rating is one indication that a lawyer is most likely experienced and able. When I engage counsel in other jurisdictions on behalf of clients, all other things being equal, I look for an “AV” rating.

Other information is available through the AVVO website. AVVO, which rates lawyers on a scale of 1 to 10, is new and is controversial. If a lawyer has not registered with AVVO and “claimed” his or her profile, AVVO may include only a very basic outline of the lawyer’s background. AVVO may also assign a base rating to such persons, which often seems to be in the range of 6 to 6.5. If a lawyer with such a profile would register and then list awards, bar activities, speaking engagements, etc., that person’s rating might change very quickly to a 9 or a 10. If a lawyer has a very basic listing on AVVO (no photograph, no extensive biography) and a lower rating, that may be simply because the lawyer has not claimed his or her profile and the rating should, again, be taken with a grain of salt. However, if a lawyer has a high rating on AVVO, then that is, again, a piece of positive information.

3. Notify Your Insurance Broker and Carrier. You should also call your insurance broker immediately upon receipt of the suit papers and should forward copies of the papers to your broker to determine whether there might be any coverage for the lawsuit. As a further caveat for future reference, if you receive a demand letter threatening a claim before a suit is filed, that should be forwarded to your broker. Some policies require notice of any claim or occurrence and of any suit. It is always better to be safe than sorry. If there does appear to be even a possibility of coverage, it is a good idea to get confirmation directly from the carrier (and not just from the broker) that they are “on notice” of the claim. Your lawyer can be helpful in interacting with your broker and your insurance company. If there is coverage, the carrier will probably have to step in and provide a lawyer to defend the suit at their cost.

4. Preserve All Information. Once you are in litigation, or even aware of the prospect of litigation, you need to preserve all information, including emails and electronic information, that may be relevant to the litigation. You should involve your lawyer in this process. There is one strong word of warning here: Sometimes litigants try to destroy potentially damaging information. Not only may this subject the litigant to sanctions and other legal issues, *it never works*. The opponent will find out and will be able to prove the other side tried to cheat. There is an old adage among trial lawyers

about witnesses who testify: "You lie, you lose." It is the same with litigants who try to hide relevant information.

5. Monitor the Situation Carefully. If you have counsel in place, have notified your broker and carrier, and have preserved all information, you should have taken the necessary preliminary steps. However, you still need to be vigilant. You should expect regular updates from your lawyer. If you have not received them, call the lawyer or send an email.

Make sure your carrier has responded. If the carrier is providing a lawyer, you need to understand that the lawyer is *your company's lawyer* and *not* the carrier's lawyer. Unfortunately, some "insurance defense" lawyers (those who are regularly engaged by carriers to defend insureds) seem to forget this. Sometimes, insurance defense lawyers will keep the insurer fully informed, but not the insured, who is the actual client. If this happens to you, you need to speak up and remind the lawyer that *your company* is the client, not the insurer. It is perfectly appropriate for the lawyer to keep the insurer informed, but the lawyer should also keep you informed.

You should be aware that many insurance policies give the insurer the right to settle the claim, including over your objection. However, you should be fully informed of any proposed settlement and your company should be fully protected in any proposed settlement. There are a few policies that require an insured's consent to settle, so, again, check the terms of your policy.

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