IS THERE A LAWSUIT IN YOUR FUTURE? HOW TO CONTROL COSTS, RISKS, AND YOUR OWN ATTORNEY

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The most dangerous legal expense a company can incur is the cost of litigation. Whether you are the party suing or being sued, the costs of litigation can eat up your company's profits in a hurry if you don't keep a tight lease on the process and on your own attorney. You should be very concerned with any lawyer who does not work hard to keep you away from a lawsuit. If you have a claim you think should be pursued, your attorney should be talking with you about how to aggressively posture the claim through communications before starting a lawsuit to try and convince the other party to come to the table. If you have just gotten sued or are about to be, your attorney should be talking to you about when he sees the first best opportunities to resolve the claim before you sink too deep into the litigation process. You should closely question any attorney who advises that litigation is the best course of action and make sure that he has your profitability and not his own in mind.

Most lawsuits begins with a price-tag of $50,000 and go up quickly from that point if you intend to pursue it through trial. Only the simplest cases can get resolved for less than that. It's important to recognize that this base-line cost only involves what you pay your own attorneys. Other costs such as lost organizational time and company focus can be equally costly. You should have a detailed discussion at the beginning of any suit to make sure that you have a clear understanding of all the costs and commitments you may be incurring.

There are three keys issues to consider as you weigh the potential for litigation, namely (1) the process; (2) the facts; and finally (3) the law. The process can be most important because it allows you to understand the points at which you are likely to have leverage to resolve the case. An interesting reality is that the litigation process in most circumstances is really used to position the case for settlement rather than for trial. Most "litigators" have actually tried very few, if any, cases to a conclusion before a judge or jury. The primary reason for that is because it is such a unpredictable way to settle things. Will the jury like you better or your opponent? Who has the better witnesses, the clearer "story" or looks most like the one wearing the white hat. Any lawyer who actually has more than a couple trials under his belt will tell you that a courtroom is a very unpredictable place.

So if the litigation process is really about posturing for settlement, you should expect to be talking about that issue right at the beginning. When will the best opportunities to negotiate a deal occur? What's the least expensive way to get to that point but still have an effective position? What can we expect the other side to try to do before then and how do we deal with their tactics? You should ask specifically what the reputation is of the other attorney and how he approaches this type of case. Try to determine whether he is being paid hourly (in which case he wants lots of activity) or on a contingent basis (in which case she may have an incentive for a quick deal). How do all of these issues affect your opponent? Ask specifically when the most expensive aspect of the case will occur and get a commitment from your lawyer that you will have the opportunity to approve those costs before they occur.

Even if you think you have a good case, talk to your attorney about who will present your case and whether they will make a good witness. The best facts in the world are useless if the jury hates the witness who will be presenting them. Do your key witnesses have what it takes to withstand an aggressive cross-examination by the other lawyer? Another important reality about trial work is that the only facts that matter are ones you can prove in Court. If you don't have the witnesses or the documents to back up your version of the story, the "truth" is irrelevant. The process for testimony and evidence is very controlled in a courtroom and the ability to tell your story can often get stymied by the rules of what evidence can be offered and by whom. When it comes to trial work, the "truth" is only what you can prove in a courtroom.

The final issue is of course the law. Sometimes the law is so clear that it trumps the other factors and makes the winner in the case obvious from the beginning. In those cases, settlement almost always occurs. In closely contested cases however, the applicable law is often only determined at the end of the litigation process. Most parties choose not to spend the money to get that far. Unless your legal claim or defense is clear cut, you may never find out what the "law" is as it applies to your situation.

Litigation is a business transaction and should be treated in exactly that fashion. The only thing a judgment does is cause money to change hands. If you win, you don't get to brand your opponent with a scarlet letter, you just get to cash his check if he has any money left. If you approach litigation with that understanding, you have a much better chance of keeping your profits intact.