



When the Rain Starts Pouring (and Litigation Looms)

Tip No. 1 – Don't Ignore What's Happening

Even with the best of efforts, a business can always find itself staring at the possibility, if not actuality, of the courthouse door. The temptation might be to just disregard the problem, stick your head in the sand, and hope it will go away. But this is the worst course of action. Like any other serious challenge confronting a business, litigation and its threat should be addressed proactively with business-savvy legal counsel. Rarely is litigation a “bet the company” moment—unless ignored. While costly, litigation is a process typically managed over a period of two to three years on average. The business has time. You have time. You can plan. You will get through it. But you cannot ignore it.

Tip No. 2 – Let Your Legal Team Know Immediately: Plaintiff

If a business believes a breach of contract is about to occur or has occurred, it is critical that the lawyers be informed as soon as possible, for two reasons. First, communications at this early stage are important—if not central—to establishing what will become claims in the lawsuit. These early communications will be the evidence, legal theories, and causes of action on which a successful lawsuit will depend. Second, claims have both legal and practical expiration dates, depending on their type and nature. If these dates are missed, the business may be precluded from any recovery as a matter of law or practice.

Involving counsel early has critical strategic value. The other side may not entirely appreciate that they are no longer strictly in a business setting. Having a lawyer help provide legal analysis and support to your team as they navigate pre-litigation business communications may have a significant impact on whether a suit ultimately proves

necessary. And if a lawsuit does prove necessary, then the lawyer will align matters as best they can be for the lawsuit once you file it.

Tip No. 3 – Let Your Legal Team Know Immediately: Defendant

Oftentimes, the arrival of a process server to deliver a complaint comes as little surprise to the business. But not always. Regardless, a defendant is on a tight clock to respond—30 days in Georgia following service, and 21 days for federal court. Acting quickly is therefore essential.

One place, however, that catches a lot of defendant businesses flatfooted is the failure to have a proper protocol for when the process server knocks on the door. Ideally, the business should have an SOP that requires service on an executive or key employee tasked with accepting service and transmitting the summons and complaint to counsel. Otherwise, the complaint may sit on someone's desk, unknown and forgotten while the clock ticks. If you do not respond to the suit on time, you face the costly exercise of saving the business from the damage to your defense. A defendant may have a lot to file at the commencement of suit and typically has little time in which to do so. Notifying your legal team immediately will avoid these legal consequences.

Tip No. 4 – Read the Complaint, Preserve Documents, and Identify Key People in the Know

Napoleon advised to “Never interrupt your enemy when he is making a mistake.” Like any complex form of conflict, in litigation, preparedness and promptness are essential tools for reducing the likelihood of mistakes—especially lethal ones. After litigation begins, a business must take prompt action on three fronts:

- First, understand the lawsuit. If you are the plaintiff, that means working with counsel to understand the legal causes of action and to appreciate the risks a lawsuit may pose once the other side engages. If you are the defendant, that means reading the complaint and promptly working with counsel to map what to expect, outline defenses, and determine possible ways to tilt the balance against the plaintiff, including through counterclaims or other strategic options.
- Second, both the plaintiff and defendant have a duty to preserve documents, communications, and other information pertinent to the subject matter of a dispute once it is threatened or commenced. As a matter of law, lost or destroyed documents might be fatal to a claim or defense. Accordingly, step one is to work

with IT to ensure all automatic email and electronic data deletion and destruction programs are turned off. Step two, send correspondence drafted with counsel informing the management team and other personnel to not destroy or delete any documents, communications, and information pertinent to the subject matter of the dispute.

- Third, identify to counsel key members of the management team and personnel who will be important to the prosecution or defense of the lawsuit, and instruct them to cooperate with counsel so they can learn about the facts and establish a strong control position in the litigation.

Following these steps will help a business take a leading position in litigation. They will empower you and your attorneys to avoid costly surprises as much as possible. Litigation can be unpredictable in the best of circumstances. Limit the zones where things can go wrong.

Tip No. 5 – Control the Internal Narrative

Litigation typically hits a business at multiple levels. And the smaller the business, the more impact the lawsuit may have. Regardless, pending legal action often becomes a rich source for runaway speculation for employees and others—even management. If not properly addressed, speculation often becomes negative and may spook employees to explore other options. Over time, the damage to morale and the workforce may have serious consequences for the business and its ability to press or defend a lawsuit. Work with legal counsel at the beginning to craft an appropriate narrative to your team that includes favorable information and an outline of what to expect, when, and from whom.

Tip No. 6 – Let Your Lawyers to Do the Talking

When a business dispute has reached the point of litigation, the time for direct communications with the other side has ceased. Counsel may have plenty of opportunities to resolve the matter out-of-court, and it may be in the best interests of the business to do so. But the moments after filing a lawsuit is not the time to force a resolution. Once legal action has commenced, the setting is no longer one of business but one of law. What is said at this early stage is highly unlikely to resolve anything. Instead, you may concede essential ground and harm the strategy developed with your lawyers.

Tip No. 7 – Consult Your Legal Team on Next Steps

There are multiple ways to respond to a lawsuit or counterclaim. After a thorough review of the business and its overarching goals and objectives, a good attorney will outline available options and potential outcomes in cooperation with the business. Regardless, “winning” may take more than one form, including settlement when weighed in view of the costs and uncertainties of continued litigation.

Tip No. 8 – Don’t Let the Lawsuit Rule the Roost

Lawsuits are tough for all sides. The deadlines that must be met, the large amounts of data and information that a business must produce, and personnel that the business must make available (including for depositions) will likely divert a significant amount of a business’s time, resources, and focus. But even so, litigation is a process and therefore is navigable and manageable. But that outcome can only be accomplished if the business keeps its lawyers abreast of internal operational and other needs during the course of litigation and in a timely manner. With time, the lawyers can plan and control for a good deal. And that way, they can help the business keep focused on what it does even while the lawsuit is pending.

Put Your Business in a Position to Succeed

Whether you’re just starting negotiations in a high-stakes business deal or wondering how to move forward after the commencement of legal action, having the right legal team on your side is critical.

At Baker Jenner, we are both attorneys and counselors. We are experts in deal formation and disputes. We sit on a mountain of value. We simplify the complications and help you protect your assets. Our goal is to keep you out of litigation. And if you end up in litigation, you will be prepared to win, and we will fight for your success.

Baker Jenner believes that we earn your trust by crafting practical and efficient solutions that respect your bottom line. We know that value is more than just completing the assignment. Value is knowing how we fit within the context of your business, your organization, and your marketplace. From guarding against the unexpected to anticipating zones for success, you can depend on us as your strategic partner. Please [contact us today](#) to see how we can provide value for your business.