



A TEN-STEP PROGRAM FOR HIRING A LITIGATION ATTORNEY

By Kevin J. Thornton, Esq.

I. Recognize The Signs

Nowadays, people are more likely to file a lawsuit. Moreover, the dire economic problems that many people face today have increased the number of people willing to become defendants in lawsuits by intentionally refusing to make payments, failing to deliver goods and services, or neglecting to properly perform contractual obligations. Learn to recognize when a dispute will likely result in litigation. Be practical, realistic, savvy - and trust your instincts. Do not jeopardize your interests by failing to recognize the warning signs.

II. Pull Up The Draw Bridge

As soon as you hear that bell go off in your head and decide that you are at risk for litigation, pull up the draw bridge. Acknowledge that your customer has become an adversary. Be prepared to defend your interests by taking decisive action in a timely fashion.

III. Shut Up and Become A Sponge

Recognize that everything you say and write may be used in litigation. In plain English, follow the "Shut Up Rule." Assume that any tidbit you share will either make its way to your adversary or be unearthed during an investigation or deposition. Become a sponge, listening carefully without engaging in a dialogue. Put your soaked-up information in a memo or email for your attorney to evaluate. Ask your adversary to submit his position or demands in writing. This will assist your attorney and could clear up confusion. It might even lead to an amicable resolution.

IV. Get All Of Your Ducks In A Row

Make at least two copies of all relevant written materials, one for your attorney and one for your "working file." Protect and preserve the original documents as possible evidence. Use the assembly process to fully understand the situation and evaluate your position. Paying careful attention may enable you to settle the matter on your own. It will also save time and money. It is costly to show up at your lawyer's office empty-handed or with disorganized paperwork.

V. Find The Right Litigator Candidates

It is vital that you find the lawyer with the best combination of familiarity with your business, substantial litigation experience in such matters, a personality and style that suits you, and the ability to provide services within your budget. If you already have a lawyer, (s)he may not be able or willing to

handle litigation. (S)he may, however, be your best source for a litigation attorney recommendation. Business people and CPAs can also be great sources. Remember Rule Number III above, "Shut Up and Become a Sponge." Say only that you are looking at, for example, a breach of contract or an employment related dispute. Get the names of several potential litigator candidates.

VI. Prepare For the Interview With Litigator Candidates

Good litigation lawyers are often booked weeks ahead, so call as soon as you can. Be sure to have a list of everyone that may become involved in the litigation in hand when you call. This is necessary. If there is a prior or current attorney/client relationship with anyone on the list, the attorney may be disqualified from representing you. Ask for the hourly rate and any required retainer amounts when making the appointment, as rates and retainers vary significantly. It makes little sense to interview an attorney whose rates are higher than your budget permits. Be prepared to pay a substantial litigation retainer, hourly fees on a monthly basis, and replenishment retainers as the funds are used. Note: if expert witnesses are required for the case, you will likely be required to sign additional retainer agreements for each such expert, pay a retainer, and cover their expenses and hourly fees.

VII. Effectively Attend Initial Interviews With Potential Litigators

Be familiar with your documents and bring two sets to the meeting. Be prepared to concisely explain the events. Ideally, prepare a written chronology of relevant events. Listen actively to assess your level of comfort with, and confidence in, the attorney. Keep in mind that you are not obligated to hire the attorney. Likewise, the attorney is not obligated to accept you as a client. Interview as many attorneys as necessary until you find the right match.

VIII. Hire A Zealous and Competent Litigation Advocate

Make certain that the attorney is 100% committed to helping you achieve your objectives in an efficient, cost effective and timely fashion. Be sure that the retainer agreement outlines what (s)he will do, that the litigation retainer amount and replenishment amounts are as discussed and clearly outlined, and that all ancillary charges (travel, postage, investigators, photocopying, deposition costs, courier services and the like) are clearly defined.

IX. Actively Collaborate With Your Litigation Advocate

Remember that this is your case and regularly evaluate the litigation strategies and objectives with your attorney. Adjust your plan of action as facts develop and the litigation evolves. Be prepared to turn over all your books, records, and potential evidence. Share new facts that come to light with your attorney and let him/her decide if they are relevant. NOTE: Once you hire an attorney, the "Shut Up and Become a Sponge Rule" applies in spades. Do not tell anyone that you have retained an attorney and definitely do not repeat any of your attorney's communications with you.

X. Avoid a Trial: Resolve The Dispute Sooner Versus Later

New Jersey Courts generally follow the "American Rule" - win, lose, or draw, each party pays its own attorneys fees and costs. Keep in mind that many cases today are settled through alternative dispute resolution methods. In fact, many contracts now require participation in binding arbitration. It is my experience that the best way to avoid a trial is to demonstrate that you are ready, willing, and able to engage in one. You cannot "bluff." You must take all necessary trial preparation steps. You also need to aggressively prepare for mediation / arbitration. Be prepared to leave mediation disappointed. Mediation / arbitration is about compromise; no one gets everything they wanted. There are occasions when a trial is unavoidable or represents a prudent and valuable use of resources. When that happens, if you followed these steps, you will be well prepared for the courtroom battle.

Conclusion

The ten steps laid out above are based upon more than twenty-five years of experience representing clients in business, contract, estate, maritime, and bankruptcy litigation in New Jersey's State and Federal Courts. These ten steps should assist you to calmly and confidently deal with business litigation so that you emerge unscathed and even more business savvy.



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