

RISK MANAGEMENT

How to Avoid Litigation

Ed Upenieks

Running a business can be all-consuming. From finding a business partner to leasing business premises and dealing with clients, every decision contributes to the success or failure of the business.

Sometimes, because things can happen quickly in business, decisions are made over a handshake, on the telephone, or in a casual corridor encounter. If these decisions aren't properly documented in a legally binding agreement or contract, problems can occur later. Your business partner may have a different idea of your agreement than you do. Your landlord may interpret a clause in your lease differently from you. The contractor you hired to renovate your business premises may do the job differently from the way you wanted it done. Matters can deteriorate quickly and before you know where you are, you're grappling with a lawsuit while trying to keep your business alive.

Litigation is expensive, emotionally draining, and the outcome is always uncertain. Most litigation lawyers would rather spend time with a client *preventing* litigation than spend time in court wondering whether their clients' cases will be successful. Although litigation is unavoidable in some situations, risk management should be an active component of business management. Here are some simple, early steps to manage the risk of litigation and increase your prospects of a successful result should litigation be inevitable.

First, keep your advisors in the loop. One way to prevent litigation is to establish a good pattern of communication with your professional advisors--your lawyer and your accountant. Your professional advisors bring not only their professional training and expertise, but also their objectivity and their wisdom. By keeping your corporate counsel apprised of your business, especially newly planned ventures and initiatives, you have the benefit of their legal knowledge, their business judgments, their experience in other situations like yours, and their instincts. They are more apt to see the red flags on the horizon. They will know whether it is necessary to consult with a litigation lawyer.

Second, keep good records. Good business communication is an important discipline for any business person. You should have a practice of keeping a diary, making notes at key meetings and preparing memoranda and letters to document discussions. Far better to make a current record when discussions and negotiations take place, than try to re-create discussions long after the fact.



Third, know who you're doing business with. Learn all you can about your prospective business partners, including whether they have had previous business partners, previous litigation disputes, and if they have judgments against them. The same goes for other key business relationships like major suppliers.

Fourth, call your lawyer immediately if you sense something is awry—and *before* you sign a long, complicated contract. Business relationships can deteriorate; a seasoned lawyer can sometimes salvage the business relationship, or at least protect your investment. A contract can involve significant monies or a long-term commitment; have your lawyer review the contract and provide you with independent, objective advice.

Your lawyer can also counsel you on how to keep a proper and contemporaneous record or paper trail, assist in preparing letters to be sent to the other side (even ghostwriting them for you), and advise you on all your options. If you want a legally enforceable agreement that can be upheld in court, you need legal advice. Unfortunately, an agreement to agree, or a handshake, are usually not enough.

The later you call your lawyer, the fewer options you will have, the worse the situation will have become, and the more likely litigation will follow. If you are in a situation in which you feel uncomfortable, it may be time to speak with your lawyer.

Lawrences has a team of seven litigation lawyers, with over 120 years of combined experience. We would rather advise you on how to stay out of litigation than see your business sidetracked by a lawsuit.



Ed Upenieks chairs Lawrences' Litigation Group. He has 25 years' experience as a litigator, and has been certified by the Law Society of Upper Canada as a Specialist in Civil Litigation. Ed can be reached at (905) 452-6873 or

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