

You've Been Sued. Now What Do You Do?
The 3 most important steps to take.

- I. *Liticaphobia* - fear of lawsuits.
 - A. Fear of the time and expense.
 - B. Fear of losing.
 - C. Fear of the unknown.

- II. Three steps to ease your fears and set your business up for a successful defense.
 - A. Call your attorney.
 - 1. ~~Open the yellow pages.~~ Engage the *right* attorney.
 - √ Knowledge and experience.
 - √ Rate structure.
 - √ Location.
 - 2. The earlier the better.
 - a. Before the lawsuit is filed.
 - b. Early involvement may mean early resolution.
 - c. Deadlines!
 - B. Call your insurance broker.


1. To claim, or not to claim, that is the question.
 - a. Potential coverage?
 - b. Potential exposure?
 - b. Deductible?
 - c. Increased premiums?
2. Use it (“as soon as practicable”) or lose it.
3. BONUS TIP: Talk to your broker about adding your attorney to the panel of approved counsel.

C. Preserve!

1. Legal duty to preserve potentially relevant evidence.
 - a. Arises when litigation is reasonably anticipated.
 - b. Applies to tangible and intangible (electronic) evidence that you know or should reasonably know is relevant.
2. Comply with the duty.
 - a. Notify key personnel.
 - b. Notify IT person or IT vendor.
 - c. Pause the routine destruction of documents.
3. Collateral benefits.
4. The “cover up” is worse than the crime.

- a. Adverse inference.
- b. Attorneys' fees and costs.
- c. Dismissal or default judgment.
- d. Separate lawsuit.

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Breakfast with Buckingham

HOW TO SURVIVE A LAWSUIT

Understanding and Controlling Your Risks in Litigation


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You've Been Sued. Now What Do You Do?


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3 Tips for Being An Effective Witness

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• • • | **3 Tips For Being An Effective Witness**

- ✓ Know Your Role
- ✓ Get Prepared
- ✓ Stay In Control



• • • | **Knowing Your Role**


- Party or Fact Witness?
- Individually or as a Corporate Representative?
- Discovery Deposition or Trial Testimony?



• • • | **Getting Prepared**


- Video or Non-Video? (look the part)
- Review Relevant Documents
 - The Subpoena/Topics to be Covered
 - Document Productions
 - Affidavits/Verified Discovery Responses
 - Relevant Court Filings (if applicable)
- Get Comfortable
 - Meet With Your Attorney (privilege)
 - Negotiate Most Comfortable Time/Venue
 - Learn Tendencies of Opposing Counsel/Judge
 - Understand Legal Theories/Significance of Facts
 - Discuss Issues/Facts of Concern (mock questions)

There is such a thing as being "too prepared"




● ● ● | **Staying In Control**

- Remember That **YOU** Are “Center Stage”
- Remember the “Ground Rules”
 - Listen Carefully, Think Before You Speak
 - Make Sure That You Understand the Question
 - Answer the Question Asked - Think Battleship
 - Stay In Your “Box”- Don’t Speculate
- Remain Calm and Respectful
 - Don’t Argue The Case
 - Don’t Get “Too Cute”
- Take Breaks If/When Necessary


BUCKINGHAM
L.L.R. 1975

● ● ● | **3 Tips For Being An Effective Witness**

- ✓ Know Your Role
- ✓ Get Prepared
- ✓ Stay In Control


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● ● ● | **Alternative Fee Arrangements**
When to use (or avoid) them

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● ● ● | “A Slow-Motion Riot”

- Clients say they want them
 - Surveys show “single largest unmet need” is “better value from law firms”
 - Most prevalent fee structure (hourly) is the least efficient and value-based
- But law firms aren't using them
 - Only 8% of law firms--mostly smaller firms--derive significant revenue from them




● ● ● | What's Holding Us Back?

- Mindset—not facts or logic
 - Fear of change/uncertainty about predictability and clarity
- Association of Corporate Counsel: we call them “Value-Based Fees”




● ● ● | Popular Value-Based Fees:

- Fixed (flat) fee
- Capped fee
- Contingency
- Hybrid hourly/contingent
- “Success Fees”
- Per Capita



● ● ● | Fixed Fees

- Most used
- per deliverable:
 - \$15,000 for MSJ
 - \$4,000/deposition
 - \$2,500/first draft commission agreement
- Or per matter/case



● ● ● | Fixed Fees

Advantages:


- Good when client and lawyer have repeatable, similar, distinct projects
- Certainty for client legal budget
- Can require less client monitoring of lawyers' work



● ● ● | Fixed Fees


Risks

- Lower level associates with "fly-by" supervision?
- Lawyers can have incentive to skimp/check out (and usually in cases going wrong!)




● ● ● | Fixed Fees

- SOLUTION:
 - “Safety Valves”
 - e.g., If delta > 15%, you can bill at reduced rate (up to a cap?)



● ● ● | “Success Fees”


- Most under-utilized
- ACC – “Performance-based holdback”
 - Ties some of firm’s fees to outcome achieved, e.g.:
 - Hold 20% of billed fees and pay them x2 if you get dismissal/verdict (by date?)
 - Pay premium hourly rates if get MSJ or defense verdict, or transaction timely closed



● ● ● | Success Fees

Advantages

- Aligns interests of client and lawyer
- Rewards efficiency instead of inefficiency
- Allows client to budget with certainty



• • • | **Success Fees**


Risks

- Vague vs. objectively measurable definition of “success”
- Interests aligned at settlement time?
- Can be difficult negotiating up front— better with a solid historical relationship



• • • | **Contingent and Hybrid Fees**

- Should be explored more
- Limited only by creativity and willingness to plan ahead/run numbers
- Don't forget about **expenses**
- Hybrid hourly/contingent fees can be win/win



• • • | **Rules for Satisfaction/Value**

1. Monitor events/bills **per an agreed set of rules**
2. Who is going to work the case?
3. In AFA, use safety valves to avoid a “loser”
4. No AFA brings more value than trusting partnership with honorable lawyer

