# Legal Protection Super Secrets for Entrepreneurs and Cutting Edge Companies

## 25 Strategies for Protecting Your Company in a Recession

### A Special Report on Smart Ways of Doing Business in Tough Times

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There's nothing more exciting than building a great company with innovative products and services. We live in an information age, in which an entire business can literally be launched with the click of a mouse, and have its infrastructure on a hard drive.

Yet this has created special problems for many growth companies, whose most valuable assets are often intellectual property. Knowledge-based assets are more susceptible to legal disputes than any others.

The explosion in business litigation has lead to a dangerous set of circumstances for these enterprises. Small and medium-size companies are more vulnerable to being hit with devastating lawsuits than ever before. In uncertain times, the perils are heightened. Profits are slimmer, and resources that can be devoted to legal defense are limited.

Following is a series of strategies for avoiding 25 major errors many entrepreneurs and business professionals make, which get their companies into serious legal trouble. It's not that these approaches are "secrets" per se, although you may find quite a bit in this report that's new to you. However, the reality is the methods discussed here tend to be ignored by most business people until they get into a problem. They're not applied rigorously, and so for all practical purposes may as well be secrets. *Surprisingly, many good commercial attorneys neglect to consistently recommend these strategies.*

Because most growth companies are knowledge intensive, you'll find a detailed discussion of intellectual property protection in the first few axioms. Be aware that a*lmost all* businesses today face these issues to varying extents. The report moves on from there into other critical areas.

Each of these principles is a business lesson in itself, applicable in any economy, but more so in the difficult circumstances we currently face. If you heed these suggestions, you'll give yourself a major advantage most of your competitors will never have, and which may cost them their companies. Litigation is a thirsty and unquenchable dragon that consumes the lifeblood of organizations. It has terminated many promising firms that would otherwise have had a thriving future.

These ideas are not legal advice. Please know that each situation is different, with its own unique set of facts and relationships. No one example can uniformly fit all scenarios. You will need the help of an attorney to implement any of these practices in your particular circumstances. With that caveat in mind, read on to discover how these strategies can protect your company from the nightmare of litigation.

**1 – Register your rights.** Intellectual property issues can easily impact the success, and even the survival of a business. Technology, software and e-commerce companies are particularly at risk for legal problems involving copyrights, trademarks, service marks, patents and trade secrets. These are among the most vital intangible trade resources.

Any business model that includes significant intangible assets is vulnerable to attack. The manner in which you protect your intellectual property can facilitate your future expansion plans, or bring them to a devastating halt. Companies are at risk for legal difficulties if they fail to protect these interests *before* problems arise.

Even experienced entrepreneurs and sophisticated business professionals often overlook these critical protections, ending up in costly court battles. In many instances, the sad truth is that some very inexpensive planning could have avoided what later turned out to be a very expensive legal ordeal.

The most basic and fundamental protection begins with your company name. Many people think it's sufficient to check the Secretary of State corporation registry when they start a company. Frighteningly, a considerable number of attorneys who set up business entities are also remiss in performing enough due diligence to protect against possible infringement claims.

When the name of your business is also the brand name for your products and services, it's a core element of your commercial identity. It has a real dollar value in its capacity to distinguish you from competitors. *That means it's worth taking extra steps to afford yourself stronger protection.*

<u>Just because a name is available in a state corporate registry doesn't mean you have a right to use it.</u> That applies both to your business and brand names. It may be another company's trademark, under which they market their wares. *Use it and you're an infringer, subject to being sued.*

The simple and cost effective solution to avoid these difficulties is to check all company, product and service names through the Federal Registry at the United States Patent and Trademark Office. This is the minimum that should be done to avoid a conflict. Here's what can happen if you don't, and why it's so important.

Let's say you've started a company, which for discussion's sake we'll call General Software Technology Corporation. Over a five or six year period you and your team do a great job. You now have a substantial customer base and market recognition in your region.

Then one day you open your mail, and find yourself reading a cease and desist letter from a law firm. It says their client is a business with a similar name, and a trademark that has been in use since before your company started. It demands that you stop using *your* company name, and all references to it in promoting your products. Not a good day.

You call your lawyer, who investigates. Turns out there's a technology company called General Software Services, Inc., headquartered in another state, which just opened a local office in your city. They have a trademark registration on their name. Your lawyer confirms that they have indeed been using it longer than you have been in business.

Since you didn't do a trademark search on *your* company name, or register it, that's bad news. Perhaps you're asking why, since the two names aren't exactly the same, and your name was available in the state registry when you first started. Answer: *It doesn't matter.*

A common misconception is that if company names are not exactly the same, there's no infringement and no potential for a lawsuit. That's not true. Under trademark law, the predominant consideration is not whether the names or marks are identical, but whether they are *similar enough* to cause a likelihood of confusion in the relevant market. And not whether there *actually is* any confusion mind you, but whether there would be a *likelihood* of it among customers. That's essentially all a trademark owner has to prove to win. The same is true of a service mark, which is the registered name of a service, instead of a product.

For example, if it can be shown that the market can draw the conclusion the two companies are either the same, related or affiliated when they're not, it indicates a likelihood of confusion. Potential misunderstanding also exists when consumers mistakenly believe one company endorses or sponsors another, when it doesn't. The potential for misunderstanding is the standard by which cases are judged.

In the scenario just outlined, you'd have to change your company name, and your product names too if they were similar. Now all of a sudden no one in the marketplace knows who you are. *You've lost your commercial identity.* You'll have to alert customers to your name change, and modify the brand names of your products. It makes your organization seem unstable, and erodes their confidence.

For instance, if you sell a software package costing tens or hundreds of thousands of dollars, customers will be questioning whether you'll be around tomorrow to service it. That can be a fatal blow. Certainly, it's a public relations disaster and is very disruptive to sales, operations, stability and growth.

Had you investigated more carefully, and made necessary adjustments in advance or obtained the appropriate registrations, all of this trouble could have been avoided.

Registering your intellectual property is analogous to taking out an insurance policy. It provides significant rights and remedies. Just like the insurance policy in your file cabinet, the certificate of registration is there when you need it. If a fire ravaged your offices, without fire insurance you'd have difficulty picking up the pieces. In the same way, it's too late to gain the full benefit of registration *after* someone has infringed your rights.

The bottom line: consult an intellectual property attorney about performing effective due diligence and registering your rights. Now, here's how to determine what level of security you need…

**2 – The higher the stakes, the stronger the protection.** The extent to which it's appropriate to take extra precautions to guard your rights largely depends on your business goals. Do you want to remain a small shop with a handful of local clients, or do you foresee developing, distributing and licensing products or services internationally? Your answer will determine what steps to take and how much to spend.

For example, a standard clause in a license deal is a representation and warranty that you own title to the trademark or service mark, and that you're not infringing another party's rights. How can you know you haven't infringed on someone else's rights if you haven't done the due diligence just mentioned? And if you haven't, the minute you enter that license agreement you've already violated it.

There are several reasons why intellectual property assets may ultimately be the most valuable possession your company owns. First, as we already discussed, your trademark is how customers recognize your company's product or service. As important, it conveys the sense of reliability they associate with you, and gives you brand recognition. How valuable is the name and proprietary search technology of a company like Google now worth?

What would happen if you owned Coca Cola, and someone bought all your bottling facilities and hard assets, yet you kept the trademark? You could immediately go out and get financing, restart business operations, and have instant market penetration because everyone knows your trademark. On the other hand, the company that bought your buildings and trucks has no brand recognition and will have a much harder time capturing market share.

So brand recognition is one value. A second benefit afforded by the right protection is a safeguard on your opportunity to grow. Without trademark registration, your expansion plans can be legally halted. *Permanently.* Here's how it can happen.

Let's say you've been conducting business primarily in the Northeast corridor. Another company with a similar name is based in California, and has been slowly but continuously expanding eastward. Now they have a presence in 45 of 50 states, and are finally beginning to make inroads into your territory.

They have a trademark that was developed in good faith, approved and registered. They did the appropriate trademark search before they filed their application, but your company name and brand didn't show up. That happens sometimes – especially with businesses that didn't take the time to protect their marks.

Later, when you try to obtain your trademark, their registration will block your application. After all, they were first in line. If you used your mark in business before they did, then you might start a legal proceeding to cancel their registration, but now you're incurring the large costs of litigation. Also, courts are reluctant to help businesses that sit on their rights, and deprive others of trademarks that were adopted in good faith.

In this instance, your competitor legitimately had no knowledge of your existence, and did their due diligence. Since they have a registered trademark and you don't, that means the best outcome you could hope for in a lawsuit would be to retain your company name, and continue to do business in the locale you've served.

It also means they get to maintain their presence and name in 45 states, and you retain rights only in the remaining five. *That's where you'll stay for the duration of your corporate life.* If you even attempt to do business with a customer in one of their states, then you're a willful infringer. Your hopes and plans for building a hugely successful nationwide business are now demolished. Was it worth saving the money on registration?

If you think acquiring these protections is too complicated or costly, ask yourself this: what does it cost to lose your business? A trademark infringement lawsuit can easily cost $250,000.00 or more. Small companies routinely sue each other into bankruptcy. Contrast the cost of *shielding your business* with being *forced out of business*. There's a clear economic benefit to proactively guarding your rights.

A third advantage of registered intellectual property relates to investor financing. If you intend to seek venture capital financing, your backers will want to be assured that the product they're relying on is not subject to infringement claims, and that the rights to the company's brands are properly protected. Forestalling legal problems with registration allows you to present a more solid package, increasing your chance of getting money.

**3 – Control your content.** It's common for up-and-coming companies to create a broad range of written and visual materials that aren't adequately secured. These include publications, software, in-house manuals, website content, sales and marketing brochures, advertising and other works. Often these will have both written and pictorial components. All these are expensive to create. Your rights in them can be seriously compromised if you don't take appropriate steps to guard them.

Simply adding the copyright symbol to any of this intellectual property is not enough to shield your interests. Each work needs to be registered with the United States Copyright Office to have full protection. Otherwise, if another business plagiarizes your materials or knocks off your software, your options will be limited.

You can't start a lawsuit for copyright infringement until you register. Once you do, the Copyright Law allows you to recover compensation either for lost income, or against the infringer's profits. Also, because proving lost profits is often difficult to do, current statutes provide an alternative – to recover money damages set by the Copyright Law itself…*if* your application was approved *before* the infringement occurred.

So be clear on this: although by law you do have a copyright in a work when it's created, *you can't enforce it until you register.*

This same requirement applies to recouping attorney's fees, if you have to litigate. If your copyright has been infringed, and you've lost the right to collect attorney's fees because you haven't registered, you've placed your business at a major disadvantage. That's because the infringer's attorney can now prolong the litigation, make it expensive for you to prosecute the case, and quite possibly force you into an unfavorable settlement.

At best, if you register when you first discover an encroachment, you'll only be able to get the profits the violator made from using your work, and possibly regain lost income. However, you must *prove* that you actually lost revenue, and that can be problematic and expensive. In many situations, the cost of litigation will substantially exceed the amounts of either profit gained or income missed. And since you can't be reimbursed for legal costs because you don't have a registration, the case may not be worth pursuing. It can be a loss for you all the way around.

Nevertheless, sometimes suing is the only way to stop infringement. In one case we handled, our client was a marketing company that developed, wrote and licensed sweepstakes packages to various publishers for promotional purposes. Infringers come in all shapes and sizes, and in this instance, one licensee was a major international publisher. The publisher had cut and pasted our client's content to make new sweepstakes packages. We sued for copyright infringement and quickly obtained a substantial settlement.

Even in the absence of any settlement, or award of monetary damages, suing to get a court order to stop an infringer's activities could be necessary to preserve your business.

**4 – Map out a prioritized protection plan.** If you have multiple trademarks, service marks, copyrights and patents and can't afford registration for all of them at once, the most cost effective approach is to establish priority according to key markets.

Is your market limited to the United States? If it's North America, you'll need to consider protection in Canada and Mexico. Will you be launching your product in Europe? There are special considerations for foreign registrations. The location of your manufacturing facilities or points of service are other potential registration sites. It's also critical to evaluate your competition's markets.

On the other hand, if you're only doing business in a small geographic area such as the Northeast, and that's where you intend to stay, then you may not need to worry about the other states or countries. Once again, an effective intellectual property protection strategy is always built around company goals. That's the assessment you need to make with your lawyer.

To get a federal trademark registration your products or services have to be involved in interstate commerce. If you're offering them over the Internet, then almost by definition you're involved in interstate commerce, since your customers can be anywhere. On the other hand, if your business is solely within your state, you don't qualify for federal registration, because your commercial activity doesn't cross state lines. However, you may be eligible for state registration. In that instance, you should register your trademarks and service marks with the state.

State trademark registrations are very inexpensive because states don't go through the same rigorous examination process as the feds. If your application is approved, when people do trademark searches, your name will show up as a state registered trademark. It gives you priority in a dispute if the other party doesn't have one. Priority to use a trademark in commerce is based in the *first to use* – your state registration would be evidence of your priority of commercial use, and have preference.

Foreign registration assessment can be important even if you don't intend to expand overseas. Here's why. Under international treaty provisions, foreign organizations can extend their rights to a trademark into the United States, and have priority over your company, *even if you have filed an application.* This is how it might happen.

Let's say a London company files a trademark application in the European Union on March 14$^{th}$, and you file yours a month later on April 14$^{th}$. In August of the same year, they file in the United States. Under law, if they file a U.S. application within six months of their foreign filing, they get the priority here in the U.S. of their original March 14$^{th}$ foreign filing date. Since it was a month before yours, they would be entitled to registration over your application.

As a practical matter, that means you must relinquish your name, or risk being sued for infringement. Once again, your company *and* related product brand names will have to be changed.

So if you're in an intensely competitive industry, and a new product or service development has surfaced that several main competitors will want to exploit, take heed. If you know that key players are overseas, foreign registration may pay just to protect your interests locally. At the very least, consider investing the legal fees necessary for a proper evaluation.

Sometimes a successful coexistence agreement can be worked out, but it's best not to plan on it. In an unusual case, we represented an international religious organization. They had an established trademark in use throughout North America and Europe, relating to their meditation retreats, religious services and educational programs. Then an international hotel chain began using the same trademark to promote its New Age health spas and specialized yoga retreats. Their marketing efforts were principally in Asia, although they sought to expand into Europe.

We worked out a successful coexistence agreement between both parties. The arrangement provided for separate global territories in which each organization retained use of the trademark. Certain limitations were agreed to on each group's use of the trademark in overlapping territories. Our client was able to keep their mark, and was spared the enormous expense of international litigation.

In another case, our client was importing children's clothing from Korea, and selling to retail outlets here. Unfortunately, his company name was similar to a long established and well-known mail order clothing company. He received the dreaded cease and desist letter. In this situation, we had to advise him to change his business name. It's not always possible to work out retention of a name and as you can see, loss of trademark rights is a real danger. Registration confers valuable protection and preempts problems.

In any of these scenarios, an intellectual property attorney can do a full trademark clearance for you. It includes a comprehensive search along with an analysis to make sure you have good title. The process is very much like doing a title search before you buy a home.

It normally takes nine months to a year to get a trademark, service mark or a patent registration, if there are no subsequent issues or problems after you file. The federal government does a very rigorous examination of applications, and the process is time consuming. Keep these time frames in mind when you do your planning.

The rule is: make a list of all your intellectual property assets and review it with your attorney. You can then prioritize the correct strategies to protect them, based on your company goals, timelines and financial capacity.

**5 – Hire the right lawyer.** Business law is now complex enough that no one attorney can have answers for every legal question and situation that may confront a company. The best solution is to hire a good generalist, who preferably has a practice concentration in the areas you'll need the most help with.

For example, if you're a technology, software or e-commerce company, you'll have many intellectual property issues. You'll be most effectively served by a practitioner whose main focus is in this area. He or she will have knowledge and insight into the subtleties of intellectual property law that a general commercial attorney will not.

Retaining an appropriate law firm is a lot like hiring a doctor if you were to need an operation. First, you wouldn't go to an orthopedist if you needed a heart specialist. Second, do you want to use the surgeon who does that procedure twice a year, or the one who performs ten a week? There's no substitute for the appropriate expertise.

In addition to a specialized practice background, for your day-to-day questions you also want a firm that can advise on and handle a broad spectrum of business matters. That includes contracts, setting up various types of entities, financing, and employment issues. These are concerns almost every business has.

A good firm will be able to refer you to competent counsel for situations it cannot adequately address. You should confer with your lawyer on what matters may arise that are outside the firm's experience, and inquire about whom you might be referred to. If the firm can't give you some reputable names, they may not be as experienced as you need.

**6 – Police your property.** In order for you to receive full protection from your copyright, trademark and patent registrations, you must take a proactive stance. That means asserting and enforcing your rights. There is no guarantee another company or individual will not infringe, nor will the government actively work on your behalf to find or prosecute them. It's up to you.

The mere fact that you filed an application that was approved and registered only gives you access to legal remedies. As already discussed, you cannot seek remedies and damages if you don't register. When you do come across an infringer, you should immediately notify your attorney, who will then send a cease and desist letter. If the infringer ignores your request, you'll then have to sue.

Your registration functions as a deterrent, and has a presumption of validity. Once your lawyer notifies the other party about your trademark, copyright or patent, and they knowingly continue to use it, they become willful infringers. The penalties against them could then be greater.

There are a few simple, inexpensive ways to police your intellectual property. For example, there are software packages available today that will scour the Internet for any incidence of your content having been published, thereby alerting you that your copyright was possibly infringed. In the absence of that, a simple way to keep abreast of where your written material is used is to take several unique and specific phrases from it and create a Google alert. That way when it's posted, you'll be notified.

Enforcing your rights is expensive even if you have a registration, but much more costly if you don't. If you have to sue to defend your trademark or service mark, you'll need to have a survey done to prove likelihood of confusion. The current cost of hiring a company to perform that analysis is approximately $30,000 to $50,000, depending on the complexity of the survey.

However, if you don't have a trademark or service mark registration and file a suit, you'll have a second burden. The reason is that now you'll need the first survey *and* a second set of evidence, to prove that your name actually functions as a trademark or service mark the market recognizes. That survey bears a similar price tag, and your costs will double. If you have the registration, this second survey is unnecessary. If you don't have either or both of these surveys, as your situation may require, you probably won't win your case.

An intellectual property attorney is best suited to help you with policing activities. For example, one of our clients is a designer and manufacturer of custom t-shirt and hip-hop paraphernalia. When they retained us, they had one trademark. We have since registered numerous trademarks for the company, and actively police their trademark properties throughout the United States. In that capacity, we've stopped several infringements and won beneficial settlements for them from California to Florida.

On the other side of the coin, you may be in a business in which product piracy is common, and at times be the target of wrongful allegations yourself. You'll need protection if that occurs. We represented two such clients. One was an importer of clothing, and the other of handbags. U.S. Customs seized their shipments, and claimed they contained counterfeit versions of certain famous registered trademarks, which the owners had recorded with Customs for import monitoring.

They were fined for violations of U.S. Customs regulations and trademark laws, in the sums of $375,000 and $518,000 respectively. In each case, we filed a petition with Customs and contested the fine. Customs ruled in favor of both clients, and dismissed the fines completely.

If you find yourself in a situation like this, be sure to hire a firm with experience in both intellectual property <u>and</u> in working through the maze of Customs regulations. *Ask before you retain.*

**7 – Negotiate first, litigate later.** Litigation is expensive, exhausting and disruptive. For a small organization in the precarious startup phase it can be a dream killer, financially depleting and destroying the company.

It's far better to negotiate a workable resolution for all parties involved. When things reach a point where lawsuits are being threatened, it's best to have your attorney be the intermediary. He or she can shield your organization from further damage, and can handle things in a dispassionate manner that doesn't fuel further animosity. Here's an example.

We represented a children's clothing wholesaler that sold to major retail outlets and national department stores. A major international corporation promised the client a license to manufacture and sell their brand of children's clothing, which had significant market recognition. They then reneged on the deal. We filed a lawsuit for breach of license agreement. Our next strategic step was to convince the global manufacturer that it was in everyone's best interests to negotiate rather than fight it out in court.

We worked out a settlement for a seven-year, worldwide, exclusive trademark license for our client, potentially worth in excess of $50,000,000. Through negotiation, the client saved the exorbitant expense of long-term intellectual property litigation, and secured a major business opportunity.

In another situation, we resolved a conflict for a software firm at minimal cost. They had a partnership agreement with another developer to create a specialized online database for the healthcare industry. The relationship deteriorated, and our client proceeded to move forward with finishing the project and marketing a now completely rebuilt product. Then their former partner hit them with a $6,000,000 software copyright infringement lawsuit.

Early in the case, we were able to convince the former partner that their position was questionable. We then negotiated a settlement that represented a minute fraction of the multimillion-dollar claim and the potential cost of litigation, freeing our client to continue with their venture.

The lesson: litigation should always be a last resort.

**8 – Double bind 'em if necessary.** If you have multiple contracts with another company, and they sue you on one of them, you have a potentially powerful response under the Uniform Commercial Code, or UCC.

The UCC is a body of law governing commercial transactions, which has been adopted in varying extents by every state. It holds that if you have reason to believe a party may not perform under the terms of one agreement, you have the right to ask for confirmation that they acknowledge their obligations in, and will perform, under the others.

Many business agreements have similar "boiler plate" provisions. So if the validity of a particular clause is being challenged in one of your agreements, this approach has the effect of putting your business associate into a bind. On the one hand, if they acknowledge their obligations under the other contracts, they can undermine their contention that the clause they're disputing is invalid. Their other option is not to confirm their obligation, in which case the UCC permits you other remedies.

These are situation specific, and too broad to recount here. However, your lawyer will be able to review the facts of the situation with you, and devise the appropriate response. Suffice it to say, this is a potent strategy if the situation warrants it.

The bigger lesson here is that in most instances, if you had done enough due diligence before you got in so deep with the other party, you might have avoided the conflict altogether. Companies generally don't do enough checking on those whom they hire, buy from, or sell to. Make it a policy to check out whom you're doing business with more carefully *before you get involved*, and you'll save yourself from a lot of legal aggravation and expense.

Ask your attorney about what services he or she can provide for background research. If you find out your prospective business associates have been involved in many lawsuits or don't pay their bills, steer clear of them.

**9 – Create multiple layers of protection.** Several layers of legal protection are sometimes warranted and indispensable. In additional to trademark, service mark and copyright registration, patent protection is worth exploring if your product is suited to it. Here's why.

Once you put any software or technology into the stream of commerce, without a patent it's fair game for reverse engineering. That means a potential competitor can dissect your product to see exactly how you accomplish a particular result, and devise a similar product to do the same thing. Or worse, steal and market your entire product offering.

With a patent, you have comprehensive legal protection for your inventions. No one else can make, manufacture, use or sell any invention that accomplishes the goal or end result in the same way that your methodology does, as specifically set forth in your patent application.

This is a deeper level of protection than your copyright. The copyright protects your original expression of an idea, but not the idea itself, nor will it protect the functional elements of your creation, such as how a particular result is achieved. *The patent protects the underlying idea, method and essential functions of your new product, process, improvement, etc.* An example will make this concept clear…

Consider this scenario. You write a software program that automatically tracks inventory, reorders in timely fashion, and continually checks and solicits new vendors for better terms and pricing. The specific source code can be protected by a copyright, but the basic idea of a software package that performs these tasks in a unified way can't be, nor can the fundamental method or manner in which your software functions to produce its result. Another company can legally create similar code to perform the exact same functions, as long as it doesn't copy your code to do it.

However, if you obtain a patent and a competitor develops and markets a software product to perform those precise functions in the same way your program does, then it's infringing. You now have remedies under the law to stop them and be compensated for any economic damage you sustain.

In this example, your copyright protects the code you've *written*, the patent protects the *underlying idea itself along with its method of functioning,* and the trademark protects *what you call the product or its brand name*.

It's critical to know that if you make a new product available or disclose it to the public, and you don't file a patent application on it within one year, you're permanently barred from doing so. You've lost that protection. A competitor can then reverse engineer your product, create one that does the same thing yours does in the same essential way, and there's nothing you can do about it.

With licensing deals especially, often multiple layers of protection are required. An example is a hybrid licensing arrangement we structured for Cindy Lee, owner of Om Yoga Center in New York City. She created a product called "Om Yoga in a Box," for home instruction. It includes a book, flash cards and a music CD, all in one package, and is marketed through book clubs.

We drafted and negotiated two documents: a joint venture contract between the principles, and a publishing-merchandising-licensing agreement. The product has been a national best seller, providing excellent income and visibility for our client. Everything has run smoothly because the deal was set up properly, and the necessary protections were in place from the start.

The incidence of counterfeits, or knock offs as they're called, occurs all the time in many industries. Software developers and producers of low-cost inventions for consumers are particularly at risk. If your product is knocked off and you're not in a position to defend your rights, it can destroy your profits and lead to the ruin of your business.

If you have an Internet-based product that's copied by an infringer, and there are subsequent copies of the stolen version, the chain of losses can be staggering. Look at what happened in the record industry. If they hadn't taken steps to protect, police and enforce their rights, the damage would be even worse.

**10 – Say what you've done, not what you'll do.** With sales and marketing literature, you walk a razor's edge between crafting language that will persuade a potential customer, and saying something that can hang you in a lawsuit.

You can talk about what your products or services will *generally* do for the customer. You can also speak about *past* documented successes, subject to confidentiality considerations. Yet even with regard to your past performance, it's safer if you say that "prior results are not a guarantee of future performance," somewhere on your brochures in small print.

Beware of any wording in your marketing materials that is too specific, or overstates your capabilities. That also goes for anything you or your salespeople say verbally. These are the stuff of lawsuits.

Representations as to what *precisely* you will do for a customer are best stated in a contract. However, even a contract that specifically sets forth how you'll perform is not necessarily an airtight protection against being sued. In a dispute, your customer's lawyer may allege that his client was fraudulently induced to enter the agreement based on fallacious marketing claims. That's why it's important to avoid overselling.

**11 – Walk away if it's a game you can't play.** No matter how lucrative an opportunity, if the ability to provide a service is beyond your capacity, or would require a major stretch into unknown performance territory, admit it and move on. You'll avoid an almost certain lawsuit for nonperformance.

We're not talking about overselling, as in the previous strategy. This is about making good assessments at to what you can actually do, so you don't get into deals you can't handle.

Inaccurate estimating is a facet of most business lawsuits. If it's not costs or pricing that are improperly calculated, then it's completion schedules, performance capacity, and overall risk assessment. Especially if it's a project with aspects you've never tackled before, it's poor judgment to think you can magically shorten the time it will take to figure out how to do the job properly.

Unfortunately, if a deal seems sweet enough, many companies bite at the hook, believing they can make it work by trimming expenses. Sometimes organizations will eat the entire cost of an initial project in hopes of winning future business, which later evaporates. This approach often leads to conflict, and is generally a recipe for an expensive trip to the courtroom.

If you can't win the business based on your actual capabilities, don't get involved with that opportunity. Otherwise, you may end up with an unhappy client who sues, or be tempted to initiate a suit yourself. The cost of defending or bringing the lawsuit will probably devour all the profits on the deal, and perhaps several others.

Along the same lines, don't ask a vendor to do the impossible. If they can't deliver and you sue, this is what their lawyer's defense will be: "impossibility of performance" -- or that you changed the deal somewhere along the line, resulting in confusion and delay -- or that there were unforeseen circumstances.

We handled a case for a national insurance company that was in a dispute with a construction and demolition business they insured. The construction company had run up the deductibles on its commercial liability policy due to many personal injury claims made against them. Our client settled and paid these. But the insured refused to pay the deductibles it owed. We sued and won a judgment against the construction company for $750,000.

If the construction company had made an effort to review and revise its coverage when the personal injury claims and expenses mounted beyond its expectations, it might have avoided the suit. They neglected to make accurate and timely estimates of their expenses. So the moral of the story is: *monitor, reflect and revise, both before and after you make a deal.*

**12 – Never refer to a person or company as a partner unless they are. "**Partner" is a legal term, and automatically implies that you have a higher level of responsibility to the other party than would otherwise exist. This is also the case with referring to another company as being part of your "team," when multiple organizations are working together the same project.

In recent years these terms have been used very loosely, especially in the technology sphere where several vendors often work together to provide a complete "solution."

*Don't.* In the instance of a dispute, your partner's or team member's attorney will infer and insist that the legal meaning of these words apply, along with the obligations they imply. If you are going to work with another party on projects, have a written agreement that specifies you are not partners or engaging in a joint venture relationship, and have no special responsibilities to each other.

In addition, without the protection of a written agreement that clearly outlines the nature of your relationship, you might be dragged into a lawsuit by a third party that claims you are "jointly liable" for harm your so-called "partner" may have done.

**13 – Scrutinize your e-mails.** E-mail is easily the most dangerous form of business communication. It lends itself to quick, informal messages that employees tend not to give a lot of thought to. Consequently, people often write things in e-mails outside the scope of legitimate business issues at hand, which end up being used as evidence in lawsuits.

Don't ever use e-mail to complain, vent or gossip. *Never* write anything of an offensive nature, use profanity or make sexual references. E-mails such as these can be subpoenaed in a lawsuit and ultimately be read to a judge or jury. They make your company look bad, and damage your case.

*Legal matters especially should never be discussed in e-mail correspondence between employees and officers. E-mails between you and your attorney are protected under the attorney-client communication privilege. However, e-mails about your legal matters sent between you and your employees, colleagues, partners or friends are not protected as privileged communications. They can be subpoenaed as evidence in court, and used against you. So beware.*

Compounding the problem is that many times e-mails cannot be completely deleted. As retrieval technology becomes increasingly sophisticated, more of them can be recovered. Litigators can hire forensic experts to do this.

If your e-mail does end up as evidence in a suit, it may easily be taken out of context. It can be the lever by which an adversary extracts millions of dollars from your business. So if you don't want to end up as Exhibit A in a lawsuit, keep your e-mail communication brief, factual, polite and to the point. Establish a company-wide policy that insists on this standard, and explain to employees why it's essential.

**14 – Have rules for writing.** In any conflict that ends up in court, each party is entitled to see all written documents relating to the matter through a process called discovery. That means all e-mails, meeting notes, performance appraisals, project documents, memos and anything else you and your employees have written that's relevant, will be seen by the other side.

After gaining access to your sensitive internal communications, their lawyers will then excerpt the sections that justify their claims, and twist them in a way that puts your company in the worst possible light. Incriminating written materials create more problems for companies than any almost other type of evidence.

We've already talked about the special problems relating to e-mail, which are serious enough to deserve special treatment. Here are some additional strategies that will minimize or eliminate the harm caused by other writing, if you make it a company policy to follow them.

Meeting notes should reflect the consensus of the participants, not individual viewpoints. Here's an example. At a meeting about a potential problem, one person feels your company is in the wrong. If that viewpoint is put into writing, it may eventually be shown to a jury. And when someone in your own organization thinks you're at fault, it has a powerful impact on jurors.

So if a meeting is held to decide how to proceed on a matter, any follow-up notes should read, "The consensus of the group was…" That way a negative dissenting viewpoint never has to be mentioned.

Similarly, project notes should be written with the realization that in a lawsuit, the writing will be taken out of context and manipulated to make your company look like the villain. Any problems should be discussed in a matter-of-fact tone, which is positive overall. These notes should include company capabilities for resolving issues, and actions taken to address problems.

Corporate policy manuals can be also used against you. The safest manner in which to state corporate policies is as general standards of behavior to be adhered to, as opposed to absolute rules. Otherwise, if a rule is broken opposing counsel will be asking company employees on the witness stand why the rules weren't followed.

To avoid this difficulty, there should be a written provision in each of your policies that permits modification with management approval, to accommodate special circumstances that might fall beyond their scope. That way if a policy wasn't followed exactly, the justification may be that the situation warranted different handling. This takes the thrust out of the other side's attack.

Company policy is one area where you'll need the help of an experienced lawyer to do the drafting for you, lest you ask for potential trouble.

Finally, take special precautions with electronic commerce. Many purchases and sales are made over the web, and through fax and e-mail. Paperless transactions pose special dangers for businesses. The hazard is that critical information included on a cover sheet, or in an electronic brochure, can be construed as part of a contract.

If the language on the attachments is overly broad and was never intended to be part of a contract, you may still be bound by it in a litigated dispute. The safest course of action is to send actual contracts by their own separate e-mails or faxes.

Here's the most important thing to remember: <u>assume everything you write will eventually be seen by a judge and jury. Write accordingly.</u>

**15 – Answer letters, address complaints.** *Always.* If you don't you're leaving yourself open to potential litigation. The judge and jury might assume you had no adequate response, inferring you implicitly agreed with the complaint by default, and may be liable.

In your reply, outline the company's position with clear explanations and examples. Keep the tone courteous and business-like. *Never send a nasty letter.* That way, if you end up in front of a jury, you won't alienate them by reason of rudeness.

**16 – Don't try to be your own lawyer.** Companies that are working with startup budgets often feel they can economize by using low-cost online resources and doing their own legal work. Preparing contracts, registering copyrights, trademarks and patents, and handling other legal matters without professional counsel is dangerous.

The allure of paying a few hundred dollars and downloading the relevant forms is very seductive. Yet the long-term consequences of inadequate advice and protection can expose you to unnecessary liability, and put a stranglehold on your business.

Let's take a patent as an example. The way you prepare your patent is of paramount importance. That's because in an infringement case, it's standard practice for an infringer to attack its validity, which is substantially based upon completeness and the manner in which it's drafted. You'll then be forced to defend your patent claims, before you even begin to deal with the issue of a transgression. If the patent has been drafted poorly, it's going to collapse and you'll lose your case.

Non-attorneys who write patent specifications themselves often don't know what they're doing. They typically avoid the "prior art" step, in which you have an obligation to cite all the different inventions that preceded yours, and relate in some way to your invention. You're required to show how your claims are different from the prior art. If you don't reference them and prepare your document in a rock solid way, your patent application can be compromised.

For these reasons, a patent from an online legal forms service, purchased for what you consider a "cheap" price, is unlikely to stand up to scrutiny the first time it's challenged.

Similarly, business professionals who attempt to write their own agreements, and haven't had any training in contract law or drafting principles, usually leave out many critical elements. These come back to haunt them later. Very few contractual relationships can be adequately documented with "plain-vanilla-fill-in-the-blank" type forms. Most contracts must be tailored and adjusted to the specific facts of each individual deal and transaction.

Once again, the problem isn't solved by downloading and modifying generic agreements from the Internet. If you insist on writing your own contracts, do yourself a major favor and have an attorney review your final work product before you sign it. You'll find more often than not that you'll get excellent advice about important language to add or change.

For example, one of the contract provisions non-attorneys routinely forget to add to their agreements is for recovery of attorney's fees. Consider what happens when you leave it out, and someone who owes you $20,000 doesn't pay you. If you sue, it may cost you $30,000 in legal fees, making it more expensive to collect the debt than it's worth. As a practical matter, you'll probably have to write off all or most of it. Even if you send it out to a collection agency, they'll probably negotiate a 25% to 45% reduction and charge you a 33% fee on top of that.

If you had the attorney's fees clause in your agreement, you'd have been able to recover your legal costs, and be made whole. You'd have ended up with substantially more money, all other elements being equal. So in an instance like this, the cost of hiring an attorney to do your legal work can pay for itself the first time you have to collect a bad debt.

A doctor recently retained us for help on a deal he made with a medical equipment manufacturer. His patent licensing agreement was only two pages long, and devoid of many essential clauses. Provisions for when he was to be paid, his right to inspect their books, and many others were missing. The client is a bright, highly educated individual, yet made the mistake of trying to be his own lawyer. His options are now limited. This is an error is made by even the best and brightest. *Be smart. Don't fall into this trap yourself.*

As you can see, there are many pitfalls for the uninformed, which can have real business loss consequences later on. While a major consideration for many enterprises is the cost of legal protection, the reality is that the expense is an investment in the stability of your company. If you lose the shielding and control of a key business asset, your ultimate "costs" may be in the millions, and entail the survival of your organization.

The old adage is true: You get what you pay for.

**17 – Use alternatives to litigation.** The main problem with litigation is that people get riled up and ready to fight too quickly. When management personnel get hit with papers, tempers flare, and things escalate rapidly. Here are three methods to prevent situations like this from getting out of hand.

First, add a clause to your agreements that says in the event of a conflict, both sides agree not to file a lawsuit without 21 days written notice of a dispute. This stops both of you from running off to the courthouse to gain the advantage of being first to file. Studies show juries side with plaintiffs more often than defendants, so there's usually a race to "file first" when there's a fight.

In the interim, three weeks provides an opportunity for things to cool down, and for both sides to evaluate the situation more rationally with counsel. This will increase the chances of an amicable settlement, instead of full-blown, costly litigation.

A second excellent strategy is the case presentation meeting. With this method, both sides agree to a conference that includes a senior management member, such as the President or CEO, and their attorneys. Each party has 45 minutes to present their side of the story, and explain why they'd win in court. An agreement is made in advance that none of the statements made at the meeting can be used against each other subsequently.

The senior management then convenes alone for private discussion. Many times, they work out a settlement deal, and even become friends. While this strategy isn't widely used, it can be effective and is worth serious consideration.

A third key to avoiding unnecessary or wasteful litigation is simply knowing which battles to fight. The economics of a potential dispute may be such that it's neither possible nor preferable to go after every adversary. Here's a good example.

We fought a major legal battle on behalf of a foreign sculptor whose work was being ruthlessly knocked off. The head of a European company photographed copies of her sculptures, which were on display in an overseas gallery. Soon after, almost exact knockoff copies of her sculpture, a bronze work of birds in flight, were being produced out of Asia. The knock offs were being shipped to the U.S. and sold as lawn ornaments.

The problem was her original work sold anywhere from $10,000 to $16,000. The lawn ornament copies were cheap brass replicas, selling from $500 to $800. When she went around the country showing her portfolio to art galleries, she would invariably hear, "I've seen that before, but it was a lot cheaper."

We sued the U.S. importer, the European company and its principal. We settled with the importer, obtaining significant compensation for our client.

Next, foreign prosecutors became involved in the case, citing criminal copyright infringement. Using documents seized in a raid on the European company, we were able to force them to settle also, on very favorable terms to our client. In all, we won a substantial six-figure recovery for her.

However, there were other infringers, and given the scope of her financial resources, we weren't able to stop all of them. This case illustrates the importance of knowing when and whom to fight. We chose targets that would have the most impact on diminishing the knock offs, and give the best economic outcome in terms of settlements.

**18 – Shield with privilege.** Certain written communications and other critical papers that expose you to potential liability can be protected by attorney-client privilege. You can invoke it whether your company has in-house counsel, or retains an outside law firm. The minute the specter of a dispute or litigation raises its head is the time to coordinate a documents review program.

If your lawyer can legitimately authorize an internal investigation to quantify the extent of a legal problem, and the documentation generated as a result is genuine communication between attorney and client, it can fall within the scope of privilege. What this effectively does is to protect your business from additional damaging information ending up in the hands of adversaries.

The key to the effectiveness of this strategy is that the documents must be produced for your lawyer's use. This method is valuable because management often requests reports in potentially litigious situations outside of an attorney-client context, which are then subject to being discovered during an actual suit. Depending on the circumstances, the same information may be gathered and effectively shielded under attorney-client privilege. Then the other side will never see it.

**19 – Build up a war chest.** The cost of defending or pursuing even one lawsuit can wipe out many quarters of profits for a small or medium-size company. That expense, along with the bad press and lost revenue a suit generates, can make a company fold.

There are three essential lines of defense against ruinous litigation. The first is implementing as many layers of legal protection as you can to insulate your company from liability. You've already read about some of the more critical ones. The second is setting aside a portion of profits to cover costs of sustaining a lawsuit, whether defending against one, or initiating action to assert your rights. The third is insurance.

The first option encompasses prevention. In the long run it's the best and most cost effective strategy. It's not a good idea to think you can avoid the ravaging effects of a lawsuit by throwing money at it. The nature of litigation, and especially business tort law, makes it impossible to predict the outcome of any suit with absolute certainty. And that's true even if you have the best case.

Building up a war chest is a form of self-insurance. It protects you against being blindsided by an unexpected attack, and not being financially prepared for it. Your lawyer can give you a good idea of what a case in your industry might cost in terms of potential damages and legal fees. A worthwhile rule of thumb formula is to add together the claims on both sides of a suit, and estimate roughly 10% to 20% of that figure for legal fees and settlement expenses.

So if you're being sued for $1,000,000 and you counterclaim $1,000,000, the total is $2,000,000 in combined exposure for both sides. Your fees and settlement costs will probably be somewhere in the vicinity of $200,000 to $400,000. Since 90% of all cases are settled, this is the approximate target figure for your war chest.

Having this money set aside allows you to resolve legal matters as quickly, efficiently and quietly as possible. Many business professionals underestimate the cost of bad press. Aside from the intellectual property litigation issues mentioned earlier, *any* lawsuit can be a media nightmare and adversely impact your customer base. If you're being sued, customers will assume you did something wrong, and sales may be affected. If you're suing, people may think you either weren't smart enough to avoid being duped by someone else, or you're litigious. Neither reflects well on your company.

You should not depend on immediate reimbursement from your commercial insurer, which is another reason to maintain a war chest. Some insurance companies are very quick to collect premiums, but extraordinarily slow in processing claims and adhering to their contracts. We recently had to sue two commercial insurers to get them to fulfill their obligations to defend policyholders in trademark infringement lawsuits. We obtained court orders forcing both to defend our clients as the policies provide for, but we had to sue to make them do it.

Insurance therefore should always be Plan C in preparing for potential crisis situations. Ideally, your war chest has a sufficient reserve to carry you through the time a problem first arises, until the insurance company reimburses you. It should take delays into consideration. Otherwise, you may find yourself in a situation where your available operating capital is absorbed by the expenses of surviving a disaster.

*If you're walking this kind of financial tightrope, which can snap at any moment, be aware that a sudden cash flow shortage of normal operating capital can put you out of business.*

You may never have to use your war chest money, and as you begin to expand and stabilize, it can be devoted to other purposes if need be. If you maintain a partially self-insured status, your long-term savings on insurance premiums may offset a substantial portion of the amount you set aside. Consult with your lawyer and commercial insurance broker to see if you can negotiate better rates on your general liability policy by maintaining this fund.

If you're negotiating with venture capitalists, maintaining a war chest should be part of your discussions, particularly if you're in the software or technology sector. What happens if your software is infringed or knocked off, and a stronger competitor quickly makes serious inroads into your market? You need to be able to defend yourself and enforce your patents, trademarks and other intellectual property. Your company's survival may depend on it.

**20 – Tell your lawyer the full story.** Don't keep secrets from your attorney. Sometimes clients don't share critical information because they think it's irrelevant. Other times, it's deliberately withheld. The problem is the stories *always* come out as a case progresses. And they usually come back to bite at the worst possible time.

More often than not, the effect is damaging. Your attorney would rather know up front than later on. If you share the information in advance, he or she will have the opportunity to develop a more targeted strategy, which may diminish or avoid the damage completely.

An approach that works well along with fully informing your lawyer is to conduct a legal risk audit anytime you smell a potential court fight. This entails having your attorney make a formal assessment of a dispute that is likely to end up in litigation. It includes interviewing the people involved, reviewing all related documents and correspondence, and making a report as to the extent of potential damage to the company.

Taking this step when the prospect of a lawsuit first arises can greatly minimize the adverse financial impact, more than making up for the cost of performing it. It enables you to set a reserve accurately, uncover early defenses, and thoroughly prepare the groundwork for a possible suit well in advance of a court date. These actions taken together help to create and strengthen a shield of legal protection around you.

**21 – Get another opinion.** If there's serious money on the table, and for any reason you feel your lawyer may not be up to the challenge of protecting you, get one or more additional opinions.

The law is like any other professional practice in this regard. Different practitioners can have varying opinions and approaches. You'll learn more than you would by listening to just one source, and may be surprised how one attorney stands out in scope of knowledge, insight and expertise. That's the firm to retain.

Especially if the future of your company is at stake, or if you're not fully satisfied with the service from your current lawyer, heed your gut and consider hiring someone else.

**22 – Formalize *all* business relationships in writing.** This would seem to be the most basic legal principle for staying out of trouble, yet incredibly is the least often followed. Even sophisticated business people make the mistake.

Ask yourself this question before you sign any agreement. Would the transaction be clear and understandable if a judge or jury who knew nothing about you, your company, your associates, the deal and this contract, were to read it?

Ultimately, if you have a fight the judge or a jury will have to decide what the rights and obligations of the parties are. Carefully consider how an outsider would interpret the document. The terms need to be spelled out clearly and explicitly, because ambiguity leaves room for language to be construed against you. *Nothing in a contract should be assumed.*

Here's an example of what can happen if you don't carefully document your business relationships:

We represented a client who ran a baked goods production and distribution business. He had hired a bakery facility to make various cakes, pastries and similar items. He also maintained an office on the baker's premises. Over the course of their association, they began to operate jointly in several aspects of the business, and even boasted in their marketing to be partners even though legally they were not. The relationship then fell apart. Each side claimed it was the rightful owner of the trademark, under which the goods were sold.

The difficulty was they had no written agreement, nor was there any careful tracking of expenses by our client. Each sued the other, and claimed to own the trademark rights. We negotiated a settlement in which the baker bought out our client's trademark interests for a substantial sum, bringing an early end to the litigation. This saved the client from major legal fees, freed him to move forward with other ventures, and provided much needed capital to do so.

Although we were able to make a successful settlement at the very start of this case, a lawsuit could have been avoided altogether. An agreement that spelled out the nature of the relationship between the parties would have done the trick. It sounds basic, but many times people just don't do it.

The rule is: any business relationship should be documented. That means either a contract, or when dealing with customers, at least your invoicing should specify the terms.

If you have standard agreements you use continually, have your lawyer adjust the language every time a new situation arises that they don't adequately address. It's also a good idea to have your attorney review these documents at least once a year. The reason is that standard "boilerplate" clauses may not protect against dangers raised by new business tort claims. Creative trial litigators are always coming up with novel allegations.

**23 – Obtain or withhold an assignment of rights.** Particularly with regard to intellectual property, companies often hire subcontractors to do various types of creative work, then are shocked to discover they don't have ownership rights – even though they've paid for it. This often occurs with work product such as brochures, literature, websites and similar content.

If you hire an outside firm to produce materials in which there is a copyright, trademark or patent interest, make sure you get a written assignment of rights. The law states that an independent contractor is not an employee, and in the absence of an agreement to the contrary, owns the underlying rights to his or her work product.

It's also critical to get the proper assignment for all specified uses. For example, copyrights can be assigned in part, such as for print versus online publication. This is an issue that comes up quite a bit with advertising and marketing. You hire someone to take photos for you, and the firm said you could use them in your print advertising, but didn't say you could post them on your website. If you do, you've violated their copyright – unless the copyright was properly assigned to you *in writing and signed.*

So for example, if you have a graphic designer create a logo for you, or hire a copywriter who develops website content or sales materials, have your lawyer prepare an agreement that assigns *all* rights to your company.

If you are providing services like these for businesses, you can create additional commercial value in your work just by understanding these legal interests and having the proper documentation. You should have a clause in your sales agreement that says there's no assignment of the work product unless and until you're paid in full. That gives you leverage, because if you do all the work and your customer doesn't pay, you have a copyright infringement claim against them if the company uses your materials.

In representing many creative professionals, we often find that photographers and graphic artists don't know this. In fact, many artists and other creative people are lax about protecting their work, when proper contracts and registration would afford them a much better financial outcome.

Alternatively, there are times when it's important to withhold an assignment of rights. For instance, if you're licensing the use of your products to another party, but retaining ownership of your trademark, you'll want to have a clear *acknowledgement* of your rights. It will specify in writing that you own your trademark and they don't. Acknowledgments clarify the nature of a business relationship. In this example, the other party is a licensee, and cannot make a future claim that they purchased your trademark as part of the deal, or assume ownership by virtue of their licensed use of it.

Here's a case that demonstrates the value of a well-structured license agreement, with an appropriate acknowledgment of rights. We resolved a dispute for an ethic radio station based in Los Angeles, California. They had a licensing arrangement with a New York City radio station. However, after the deal ended, the New York station continued to download and broadcast their satellite radio signal. This violated the Federal Communications Act.

We sued the New York station. We then successfully negotiated a beneficial settlement for our client. One of the main reasons we were able to do so was that we had the appropriate papers to work with, supporting our position.

**24 – Have mandatory reporting of problems.** As a product or service provider, the law regards you as being in a position of having specialized knowledge and resources, and exerting influence over your customers and clients. You are therefore held to a standard of responsible duty, which requires you to exercise your influence in a competent and reliable manner.

If you manufacture, sell or provide a product, and someone is injured by it, they don't even have to prove you were negligent. If their lawyer can show your product was defective in some way and they were hurt, it's sufficient evidence to prevail in a lawsuit and collect damages. That's called strict liability, and does not carry the burden of proof that applies to other types of suits.

This doesn't just apply to personal injury lawsuits. If you sell a $150,000 software package with an unknown bug, that later malfunctions and destroys vital records, transactions, or shuts down a major e-commerce website, you may have the same monetary liability as you would if someone was injured by tripping on your premises. In fact, your exposure would be greater.

Claiming that the product was misused, altered, or that you had a warning on it is not always enough to protect you. Case law holds that your company can be liable for the foreseeable misuse of the product. Warnings can be deemed to be inadequately or improperly worded.

Service providers are not immune from the doctrine of duty. You may have a fiduciary responsibility to clients, and not even know it until it's alleged against you. A fiduciary responsibility holds you to a much higher standard that would be the case in other business relationships. You are required to place the interests of clients above your own.

While fiduciary relationships are established practices of doing business in some industries, such as financial services, creative trial lawyers have figured out ways to imply them where they haven't previously existed. Business tort law is murky enough for these claims to have teeth at times. This is especially true if you are selling to certain unique market niches, such as the elderly, disabled, ill, or to minors. In these instances, there can be civil and criminal liability.

Here's a step you can take that goes a long way towards preventing these unhappy circumstances. Make a clear business policy that those who are responsible for inspecting and approving product safety or quality must report <u>all</u> problems immediately. Put a follow-up procedure in place for review and correction. Then make failure to report defects grounds for dismissal. Also, provide instruction in legal liability as part of the job training and orientation.

The reason this strategy works is that often, sloppy work by employees creates these problems. If defective work never leaves the house, it lowers the risk of ending up in court significantly. However, the work ethic these days isn't what it used to be in generations past. Consequently, an inspection policy with teeth is sometimes necessary.

**25 – No unconscionable contacts.** Here's a simple rule. Don't make deals that are obnoxious, over-bearing and will make a judge or jury want to vomit. If you've roasted a customer over the coals with what appears to be self-serving greed and arrogance, you'll get hurt in court **– e**specially if you're dealing with consumers. The courts generally will not enforce these agreements. They're seen as "adhesion contracts," meaning they permit one party wide latitude and "superior bargaining power," but greatly restrict other participants.

The fine print on your contracts, order forms, invoices and receipts needs to be clear, fair, above board and reasonable. The practical strategy is: don't try to force your customers into a position you'd resent if you were in their shoes. Not only may the court have something unpleasant to say, but also the media. It could turn into a public relations nightmare that costs you millions in goodwill.

Also, in this Internet age it's simple to check out a business on the web. It gives word-of-mouth a whole new dimension. If you mistreat customers, you may find your company being talked about in a very unflattering way in dozens, if not hundreds of chat rooms, blogs and forums. Not only is it bad business, it's just plain dumb.

Unconscionable conduct applies not only to contracts, but to behavior as well. Here's a case that illustrates how bad behavior can backfire on you. We represented a partner in a digital printing and photocopying company, whose other two partners secretly conspired to squeeze him out of the business. We initiated an oppressive shareholder proceeding, forcing them to buy him out, or face liquidation of the company. They agreed to a substantial six-figure settlement and reasonable terms.

Two lessons here: First, as previously stated, the difficulty could have been avoided had the relationship been formalized in writing from the start, with a properly constructed shareholder's agreement. Second, the law recognizes, supports and enforces the practice of fairness. A majority vote doesn't always rule, and it's a mistake to think you can get away with bad behavior, even if you believe your position is stronger.

## Be alert, careful and complete.

Awareness is the antidote to business legal problems. You now have valuable knowledge most entrepreneurs, business professionals and even commercial attorneys do not. *Use it.* Knowledge is worthless if unapplied. And in business, laxity has a profound cost.

Using this report as a checklist, evaluate each area of your business operations. Investigate the problems outlined here, and apply corrective measures. Start to ask more questions, because multiple mistakes can compound legal liability exponentially. Better to make your own inquiries than to have a judge or jury do it.

Of course, many other potential errors can lead to legal difficulties. However, in our experience these are among the most significant sources of trouble that draw companies into lawsuits. They can be avoided with some careful forethought and planning.

These strategies have helped many businesses escape the prospect of painful and costly legal problems. If you employ them, they'll help protect you also.

If you'd like additional assistance, call our law office at 212-366-1324. Intellectual property and business law are the firm's main practice areas.

### About Steven Mancinelli, Esq.

Steven Mancinelli is an intellectual property and business law attorney practicing in New York City. His firm counsels and litigates in matters involving trademarks, copyrights, licensing, contracts, and all phases of business startups and dissolutions. With 20 years experience, he counts among his clientele many cutting edge companies, and individuals in creative lines of work. Clients appreciate the high level of clarity, wisdom and forthrightness with which he handles their cases.

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