

Resolving Legal Disputes and the Tech Entrepreneur: The Importance of Careful Navigation

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Editor's note: This is the first in a series of articles on the pluses and minuses of litigation for the technology entrepreneur. John C. Yates chairs the Technology Group of the law firm Morris, Manning & Martin, LLP.

ATLANTA - A technology company has a goal to preserve cash in the process of growing its top line revenue. A legal dispute or lawsuit may be directly inconsistent with this goal – and could deal a devastating blow to implementation of a business plan. On the other hand, litigation may be a necessary step in protecting your company's key assets, especially your intellectual property rights.

Too often, entrepreneurial companies fail to recognize the steps in the litigation process. They initiate legal action without understanding (or being informed by their advisors) of the timing, scope and costs of litigation. Also, they may be uneducated as to the dispute resolution alternatives.

Before pulling the trigger and filing a lawsuit, consider the pros and cons of this form of dispute resolution.

Use of litigation as a tool: Litigation can be a useful tool for resolving disputes, but beware of the traps once you start the process.

Tactically, litigation is often initiated to bring an adversary to the negotiating table. The desire may be to get a quick and painless resolution of the differences between two parties. By threatening litigation – or actually filing a lawsuit – the hope may be to scare the other side into reaching a quick resolution.

In reality, this tact seldom works. If you threaten litigation – but don't pull the trigger – you run the risk that your opponent beats you to the courthouse. Rather than filing a suit in your own state and being the plaintiff, you may find yourself as a defendant in a lawsuit in another state (with added defense costs and the loss of "home cooking").

Often, the filing of a lawsuit causes the other side (the defendant) to plan for a vigorous defense. Understandably, the reluctant defendant is first concerned with protecting its rights – and less concerned with trying to predict if the plaintiff really just wants to settle.

The dreaded counterclaim: You've filed your lawsuit with hopes for a quick resolution. The plan was to bring your opponent to his knees, achieve a favorable settlement of the dispute, and move on with your business. It seemed to be working until the defendant filed his counterclaim.

A counterclaim is basically a lawsuit filed by the defendant against the plaintiff. Think of it as Round 2 in the legal match – an opportunity for the defendant to get back at the plaintiff for filing the original suit.

The filing of a counterclaim raises the stakes in litigation. In many cases, a counterclaim is equivalent to a gun that goes off in the plaintiff's face. No longer does the plaintiff control the process. Now, even if the plaintiff wants to dismiss the case, the defendant has his own lawsuit in process. The goal of a quick resolution may be illusory – and the time and expense of protracted litigation may be forthcoming.

The real costs of litigation: After a counterclaim has been filed, both sides in the litigation can move forward with the discovery process – and get down to spending some real money. Discovery involves finding the facts surrounding the case through interviews, depositions, written questions (known as interrogatories) and affidavits.

Depositions can take the most time and impose the greatest cost in the discovery process. They involve placing witnesses under oath and asking a series of questions about the facts of the case. Each side may have both fact and expert witnesses. Fact witnesses fill in the gaps about the nature of the dispute, how it came about and the players in the process. Expert witnesses are usually selected to opine as to a specific area of expertise – finance, technology, product development, etc.

And the hidden costs: The time commitment of your executive team is a hidden cost in litigation. Often, the corporate executive teams of both companies have their depositions taken, usually running one to two days apiece in length. Then there's time in preparation and reading the massive file of paperwork relating to the case. By distracting management away from running the business, litigation can impose a huge cost on the small, entrepreneurial company.

Project management and budgets for litigation: Litigation is a major project composed of multiple tasks that must be understood, managed and budgeted. Unfortunately, too often the plaintiff misunderstands the process – or is not educated upfront as to the risks, costs and time required to bring about an acceptable resolution of a court case.

Before starting down the road of litigation, an experienced attorney should walk you through the steps in the process. Each task has repercussions for your business in time, money and reputation. The attorney should review the steps to be followed in the case, from initial filing through discovery, court motions, and the ultimate trial. Risk management is essential to controlling the litigation process. Take steps to manage risks in the court case, especially those risks that may deplete company cash at too fast a pace.

From a budgeting perspective, there is a range of fees associated with the tasks in a lawsuit. Since the suit involves adverse parties, there are limits on the accuracy of the budgeting process. The other party to a suit may employ a strategy designed to outspend his opponent, thus increasing the costs of the litigation. Early education, constant communication and close expense controls are important to keep the litigation process and associated costs within budget.

Next week, we'll explore ways to avoid disputes in the first instance and alternative dispute resolutions - mediation, arbitration and resolution hierarchy.

This article is intended for educational purposes, does not represent legal advice and is not comprehensive in its review of the issues discussed above.