

## LITIGATION BASICS: WHAT TO DO WHEN YOU ARE SUED - ACT

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You hoped it would never happen. You did all you could to avoid it. But, despite all your efforts, one day you are served with lawsuit papers. What now?

Scream and curse? Turn around and go home? Pretend you never saw the papers or bury them at the bottom of your in-box? Doing any of these things would be understandable, but not smart. When you are served with a lawsuit against yourself as an individual or against your community, you need to take certain basic actions immediately to protect yourself and put your case in the best possible position to start off with a strong defense.

As an easy checklist for what to do when served with a lawsuit, remember to **ACT**—Alert Administration; Call the Carrier; Consult Counsel; Check for Contracts; Collect Documents and Things; and Take Stock of the Claims.

### 1. Alert Administration

If you are served lawsuit papers, whether against you personally for matters related to your employment or against the community, you need to make sure you let the appropriate individuals within your organization know. Depending on your position in the community or the size of your organization, that person may be your immediate supervisor, the executive director, the risk management department, in-house counsel, or some other designated person within the administration of the organization. Communities should periodically remind employees whom to notify about lawsuits.

Don't delay passing on the information. Make sure the papers get to the person within your organization who can retain counsel and take the other immediate actions necessary. Preferably, this should occur the same day you are served.

### 2. Call the Carrier

When served with a lawsuit, you should promptly identify insurance policies that may be applicable to the claim. If in doubt about whether a particular policy might cover the claim, err on the side of reporting.

Insurance policies usually contain instructions about whom to notify about a claim and how such notification should be made. Follow those instructions.

Timing of notification can mean the difference between coverage and no coverage. Check the terms of the policy. As a general rule, notify the carrier as soon as possible.

Depending on the terms of your coverage, you may have a right to choose your own attorney, or you may be assigned an attorney by the insurance company. If there is an attorney you prefer, let your insurance adjuster know your preference. Many times, even if the insurance company has the right to choose counsel for you, the insurer may be able to accommodate your preferences.

### 3. Consult Counsel

You need to get an attorney involved right away. There are important deadlines at the outset of a lawsuit. Deadlines differ depending on the manner in which you are served, the type of case, and whether the case is pending in state or federal court. You could have less than twenty days to file a response or be at risk of having a default judgment entered against you.

Your attorney will want to receive a complete copy of everything you were served. This could be quite a stack of papers. In state court, for example, in addition to the complaint, you may be served the civil cover sheet, documents explaining the court's alternative dispute resolution process, exhibits to the complaint, notices about the court's case management deadlines, proofs of service, and other forms. Your attorney will need these documents to help calculate applicable deadlines, assess whether you were, in fact, served correctly, identify other parties to the lawsuit, and begin assessing the merits of the claims and defenses.

Important strategy decisions can be made at the outset of a lawsuit. One of the first decisions to make is whether to file an answer and/or another kind of response, such as a special appearance, a demurrer, motion to strike, motion for judgment on the pleadings, cross-complaint, or other appropriate pleading or motion. If multiple parties are named as defendants (like the operator, holding company, and parent corporation of the community or multiple employees), the attorney will assess whether all were served properly and may help you determine whether all related defendants can and should be represented by the same counsel or separate counsel.

Early involvement of legal counsel will allow thorough evaluation of important issues that will help set your defense on the right foot at the outset of the lawsuit.

#### **4. Check for Contracts**

Certainly, if the subject of the lawsuit is a contractual dispute, your attorney will need a complete copy of the contract at issue and any documents related to the transaction. But it is also important to identify contracts between the parties to non-contractual disputes.

In particular, you should let your attorney know right away whether the plaintiff (the party who filed the lawsuit) has entered into an arbitration agreement or any other contract that might limit his or her right to litigate the claim in court. If the lawsuit is filed by a resident, check the resident's files for an arbitration agreement. If the lawsuit is filed by an employee, check the employee file or employee handbook to determine if the employee has entered into an agreement to arbitrate. If the employee is subject to a collective bargaining agreement, make sure to get a copy of the agreement to your attorney to assess whether the terms of the agreement impact the employee's right to sue. Identifying agreements that may impact the right to sue at the outset of the lawsuit is essential because the right to demand arbitration or other alternative dispute mechanisms can be waived if not timely asserted.

#### **5. Collect Documents and Things**

As soon as you suspect a lawsuit may be filed, and certainly once you learn a lawsuit has in fact been filed, you should identify and secure all documents relevant to the issues in dispute. For example, if the lawsuit pertains to an incident involving a resident, secure the resident's complete file (business and clinical), incident reports, investigation reports, letters (including cards and thank-you notes), emails, complaints, photographs, videos, or any other recording pertaining to the incident or the resident at issue. If the incident involved an object (like a faulty light fixture, an assistive device, or some other object that is alleged to have caused someone injury), take possession of the object as well, if you can.

Remember that many documents exist only in electronic form. These documents (emails, spreadsheets, digital photos, and the like) need to be secured, too.

If you have a document retention policy that includes an automated document/data destruction process, make sure you act quickly to secure all relevant electronic documents/data when you first learn of or suspect a lawsuit. Your attorney will likely remind you of this and instruct you to put a "litigation hold" on any destruction of documents—both hard copy and electronic—that may be related to the lawsuit.

The original documents should be gathered and placed under lock and key or turned over to your attorney for safekeeping during the course of the litigation.

The purpose of identifying and securing documents and things relevant to the litigation is to make sure you have documents that may help in the investigation of the claim, be produced in discovery (the formal exchange of information among the parties), and be used as exhibits. Any destruction of documents and things relevant to the lawsuit after you suspected or knew about the lawsuit could result in sanctions for destruction of evidence.

#### **6. Take Stock of the Claims**

Many times when a lawsuit is filed, you will have already suspected it and investigated the anticipated claim. However, sometimes this is not the case. It is important to investigate the claims as soon as possible. Your attorney should direct or be involved in the investigation. This should shield the investigation in work product and/or attorney-client privilege. Depending on the claims and circumstances, the investigation may involve gathering documents, interviewing witnesses, and conducting other background research regarding the claims, the claimants, and others involved.

A prompt and thorough investigation is key to conducting an early assessment of the claims, evaluating potential liability, assessing possible opportunities to resolve the claim, and developing a litigation strategy.

Moreover, a good investigation will set you on the right foot for the next stage of the lawsuit (and subject of another discussion) - discovery.