

Virginia

Regulatory Hot Tip 2015 –4

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Don't Jeopardize Your Livelihood By Acting Like A Turtle

I have recently been having discussions with attorneys who focus on differing business specialties including litigation, intellectual property and employment law— about the trends we have recently seen among our legal practices.

The most common shared concern is this: clients who, to their inevitable peril, seek legal assistance too late for any meaningful help.

The focus of this Hot Tip is to remind you that whatever the judicial or regulatory problem, don't wait too long before enlisting the aid of an attorney. Judicial and regulatory problems rarely disappear by themselves. And the longer you wait, the greater the chance that you will be deemed to have waived important rights. The cost of initially engaging in a matter late in the game is almost always dramatically higher. So high, in fact, that effective legal assistance at that late date may well prove nearly impossible for all practical purposes.

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NolteLaw's practice focuses on general business matters (such as business formation, acquisitions, dissolutions and employment questions) and administrative law issues (such as rulemaking and compliance) affecting regulated entities. Our diverse client base includes restaurants, healthcare providers, contractors, fiber-optic and conduit installers, business entrepreneurs, telecommunications companies, insurance entities, financial institutions, mortgage loan originators, water & sewer providers, and insurance receiverships. Jo has served as attorney for the Virginia State Corporation Commission and as in-house counsel to a privately owned national corporation. She also owned and operated an insurance surplus lines brokerage agency and an insurance consulting business.

I also want to remind everyone that the regulators, the courts and the prosecutors in both arenas are just trying to do their jobs to protect the public. But you may find yourself at the wrong end of the stick—so to speak---when it comes to a regulatory/judicial investigation. Sometimes having an advocate to represent you in these matters can assist with diffusing an oftentimes emotional, scary situation. This is particularly true if you have never been the target of an investigation.

By way of example (while protecting client identities), here is an *amalgamation* of many different scenarios and matters in which I have been approached during the last twelve months and/or which colleagues have been approached by businesses seeking legal representation.

A business owner called to report that he was the target of a regulatory investigation. He had received an offer of settlement from the regulatory agency. As we talked, it became clear that this investigation had consumed many months. During this period, the regulators, as they appropriately can do, had made frequent visits to his business, asking questions and reproducing numerous documents.

The owner advised me that he never retained copies of what the regulators took, so couldn't account for what they had seen. Additionally, the owner reported that during these visits, he had lengthy conversations with the investigators, and his answers were transcribed or recorded by the investigator. This owner also said that, in the process of the investigation, he had affirmed several statements about his office personnel and practices proffered by the investigators, but he really didn't recall any specifics. At each juncture, this business owner thought that the problems would just go away if only he would be honest and forthcoming. After all, in his mind he hadn't really done anything wrong! Unfortunately, the regulatory investigation and subsequent allegations indicated otherwise.

And, of course, his problems didn't go away, and now the owner wanted me to become involved and get the regulators "off his back" so he could earn a livelihood for himself and his family.

I had to tell the owner that, based on my knowledge and experience of the law, given the facts to which he had stipulated and his lack of knowledge about what he had supplied to the regulators, his chances of obtaining a better result than

the offered settlement were very small. Further, I had to let him know that for me to get involved in this representation and presumably request a full hearing before the regulatory body, it would require a large fee deposit, and the likelihood was that the total bill would be even twice that amount or more. Moreover, even with such an investment, the actions taken by this business owner over the preceding months of the investigation had made any kind of a favorable result—other than the proposed settlement--- a very chancy prospect at best.

Now I just **hate** to deliver messages like the one above. This man deserved an advocate. But by his own actions—all done while hoping the matter would go away—he sealed his fate. There was really nothing left for his advocate to do on his behalf.

Some other examples that readily come to mind in my legal world include:

- Waiting to seek legal protections by applying for a Trademark, Service Mark or Patent as the case may be until you already have a competitor trying to use your business name, formulae or process of delivery.
- Working on a transactional deal where you are either buying someone's assets or selling your own for over a year without bringing your attorney into the loop. Sure, you are the best negotiator for your interests in the deal; but sometimes you become so engrossed in the transaction that you lose sight of having properly executed Confidentiality, Non-Disclosure or Non-Disparagement Agreements –as appropriate---executed before you give up that proprietary information. Did you remember to find out early on whether the folks employed by that agency you are planning to acquire have non-compete agreements in place, will they run with the transaction if you purchase that agency's assets? Do you want those employees? How about that retirement account, will it be jeopardized when you purchase the asset?
- Declining to seek legal representation after being sued so that, for example, the appropriate safeguards can be put into place to avoid loss of information or document destruction.

Don't jeopardize yourself and your business by not seeking help soon enough. Unlike the turtle, you might not win the race if you delay. And it will be a costly experience.