ABRAHAMS KASLOW & CASSMAN LLP

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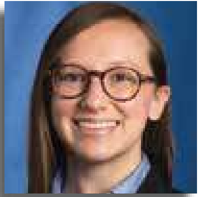
LEGAL Perspectives

OMAHA'S BUSINESS LAW FIRM SINCE 1944

# What to do if your business is sued



By Julie M. Ryan

When you set out to establish your business, you likely envisioned selling your products or services to make a helpful impact in the lives of your customers and the community. As a business owner, you also prioritize investing time, money, and effort focused at increasing your net revenue and maintaining positive brand image.

No matter your motivation behind starting and running your business, having your business be sued was not on your agenda. Consider the following when your business is faced with a lawsuit:

**1. Preserve and Collect Evidence.** Make a habit of keeping organized business records. Frequently review your record keeping policies and procedures and ensure all records kept are detailed and securely stored.

To the extent possible, make note of all relevant facts that occur contemporaneously with any given potential claim or dispute. Retain all written correspondence, including text messages, emails, social media posts, or letters, received from an adverse or potentially adverse party.

**2. Notify your Insurer.** Do not delay in notifying your business insurance provider of the lawsuit. Review your business insurance policy to analyze whether the nature of the particular lawsuit is covered, and, if so, to what extent. Discuss this with the provider. Questions to ask include whether insurance benefits can be used for attorney fees, court costs, settlement sums, or monetary judgments entered against your business.

**3. Consult with an Attorney.** Promptly arrange a meeting with an attorney once your business receives a demand letter or has been served with a summons and complaint. The demand letter will likely threaten to file a lawsuit by a certain date if you fail to respond. If your business has been served with a summons and complaint, a lawsuit has already been filed with a court. Your business generally has only one month or less to file a formal written response with the court.

An attorney with knowledge and experience in the area of law at issue can help you identify a proper response, be it a response letter sent to the claimant or an answer or motion to dismiss filed with the court.

Severe consequences for ignoring claims, even those without merit, include a default judgment entered against your business. It is best practice to allow your attorney to handle all communication with the claimant or the claimant's attorney.

**4. Implement a Strategy.** Disclose all known information and documents relating to the lawsuit to your attorney. Based on that, your attorney will explain the applicable law and identify defenses. Develop a defense strategy that fits the circumstances.

You may wish to vigorously defend a lawsuit and proceed with utilizing various discovery tools to prepare for a motion for summary judgment or trial.

Alternatively, or at the same time, you may pursue settlement. Collateral factors that may guide your decision include ongoing business needs (e.g., time and money concerns) and avoiding destroying the possibility for a continued business relationship with the adverse party in future dealings.

Communicate with your attorney on a reasonably regular basis and re-evaluate your strategy at all stages of the litigation.

**5. Assess Business Practices for Going Forward.** Certain lawsuits, but not all, may cause you to consider how you may change or update your business practices and policies to avoid having to respond to the same or similar type of claims in the future.

This could involve working with your team to identify solutions and improve training opportunities.

It may also involve working with a business law attorney well-versed in drafting business documents.

AKC Law has successfully resolved disputes on behalf of businesses for over 75 years. The AKC Law litigation team has experience in handling breach of contract claims, negligence claims, construction disputes, business succession disputes, employment law claims, and more. For more information, please call AKC Law at 402.392.1250 to speak with Julie M. Ryan or another member of our litigation team.

# What happens to my estate planning documents when I move?

By Alex Montoya

Having a well-rounded estate plan (generally a will, revocable living trust, health care power of attorney, and durable power of attorney) is crucial for ensuring your wishes and desires are seamlessly carried out, and your loved ones are cared for at the end of your life.

Those who take the crucial first steps necessary to establish an estate plan are often left wondering whether those same documents will be valid if they later move to a new state. The short answer to the previous question is, generally, yes.

Despite the general validity of those documents, there are still many considerations you should take into account before or after a permanent relocation due to the nature of estate planning documents.

**1. Wills** - As for the validity of a foreign will, Nebraska, like many other states, has a statute that upholds the validity of a will that was drafted and executed in a foreign state, provided that the will was executed in compliance with the laws at the time and place of its execution.

Despite the general validity of most foreign wills, you should still have an attorney in your new state review the out-of-state will to ensure the will's provisions are legal in the new state. States vary widely on laws related to, among other things, the division of marital property, who may serve as the executor or personal representative, and certain tax provisions.

**2. Revocable Trusts** - In contrast, revocable living trusts generally present fewer issues when it comes to determining validity and general application after relocation. Trusts are governed by contract law and normally allow for the maker of the trust to dictate the trust's principal place of administration and which state's laws will govern validity.

Again, you should always take your trust to a local attorney after moving to determine whether it would be prudent to revise the trust to align with the laws of your new state.

**3. Health Care and Financial Powers of Attorney -** Nebraska, like some other states, has a statute providing that a power of attorney for health care executed in a state other than Nebraska will be valid in Nebraska if it was legally executed under the laws of the state of original execution. As for the powers of attorney for financial matters, Nebraska's adoption of the Uniform Power of Attorney Act ("UPOAA") makes it even easier to determine the validity of those powers of attorney drafted in another UPOAA state.

Under the UPOAA and Nebraska Revised statutes, a power of attorney for finances executed in a foreign state is valid if, when executed, the execution complied with the laws of the jurisdiction indicated in the power or, in absence of such indication, the laws of the jurisdiction where the power was executed.

Remember, not every state has adopted the UPOAA, and states that have adopted it may have changed or modified the usual provisions. Therefore, as with the above documents, powers of attorney for health care and for finances should always be reviewed with an attorney after relocating.

As you can see, it is important to have your estate planning documents reviewed after making a move to a new state. Each of the foundational documents relies on state-specific laws to determine validity and interpretation.

Contact Alex Montoya at amontoya@akclaw.com or any of the estate planning lawyers at AKC Law today to discuss how a move might affect or has affected your estate planning documents.

# Keep? Or Throw-Away? Business Document Storage

By Matthew Stafford

When you think about retaining records and documents, the first thing that probably comes to mind is an IRS audit. However, there are many reasons for retaining your business documents and records. A few of them include:.

- Income, sales history, and other performance documents may be of interest to lenders you approach for financing.
- Having a clear written history of previous leases, insurance policies, and other contracts may strengthen your position in future negotiations with landlords, insurers, and other vendors.
- If you decide to sell your business, potential buyers will want to review historical records as part of their due diligence.
- If you become involved in a dispute or lawsuit, you might need meeting minutes and written agreements to support your position.

Except for a few guidelines from government agencies, you will not find many hard-and-fast rules about how long to keep your business records. But you can make a plan for record retention by thinking about the purpose of a document and future situations that might arise.

For example, for IRS reporting, most documents must be kept for three to seven years. These records should include accurate accounting and banking records, business loan information, any permits or licenses, business contracts, and insurance documents. However, business formation documents must be kept permanently.

Proper document retention saves time and money in two aspects. First, accurate documentation minimizes exposure to various tax or regulatory penalties for inaccurate reporting. Second, accurate documents and records can be valuable evidence in resolving potential legal or business disputes sooner.

You may have storage and accessibility concerns. While physical storage is an option, you may use electronic storage to store digital or scanned documents and emails. Electronic storage is available via a hard drive or using a cloud-based service. Storage on a hard drive is local to the computer alone, and if the hard drive becomes damaged or destroyed, the information may be permanently lost.

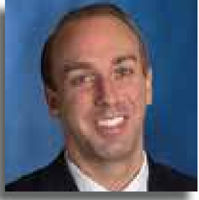
Unlike hard drive storage, access to cloud-based storage can be accomplished by saving information or records to the cloud using any computer with an internet connection. However, with internet storage, there is a risk of electronic theft.

Ultimately, it is a business decision to pick which method to use, but it is advisable to use two forms of storage. For example, keep physical copies offsite and use cloud-based storage to electronically save documents as they are received.

Consider contacting AKC Law at 402.392.1250 to connect with one of our corporate and business law attorneys to discuss a personalized business plan.

FINANCIAL PERFORMANCE REPRESENTATIONS

# Item 19 in Franchise Disclosure Documents



By Gregory Schreiber

For prospective franchisees researching potential brands, the Franchise Disclosure Document (FDD) is a key component in the decision-making process and Item 19 is perhaps the most important piece of that puzzle. Item 19 answers the all-important question for investors: ***How much money can I make?***

Under Item 19 of the FDD, a franchisor can make financial performance representations (FPR) to prospective franchisees in the sale of a franchise.

Although franchisors are not required to make FPRs to prospective franchisees, between one-half and two-thirds of franchisors now include FPRs in their FDDs.

This is not surprising as many prospective franchisees want a clear financial picture of the franchise business under consideration and want to have a better idea of what their return on investment could be in the franchise system.

A franchisor without an Item 19 disclosure may be at a competitive disadvantage and more at risk for the disclosure of unauthorized FPRs.

For franchisors that do make FPRs to prospective franchisees, they must have a reasonable basis and written substantiation at the time the FPR is disclosed under Item 19.

A “reasonable basis” for an FPR will vary from franchisor to franchisor, but generally, it is information that reasonably supports the representation made, such that a prudent businessperson would rely on it in making an investment decision. A franchisor must state whether the FPR reflects a historic performance of its franchised outlets or a forecast of future potential performance.

The franchisor must also possess written factual information that reasonably supports the FPR, and the Item 19 disclosure must expressly state that written substantiation for the FPR will be made available upon the request of a potential franchisee.

The Covid-19 pandemic has affected franchise systems in different ways in different industries, also varying by location, business model, and other factors.

On June 17, 2020, the North American Securities Administration Association (NASAA) posted a commentary addressing concerns that FPRs which are based on historic performance may not accurately represent a franchise system’s current position in light of the COVID-19 pandemic. NASAA stated that if franchise outlets represented in an FPR have experienced “material changes” in financial performance, franchisors may not make historical FPRs unless they are updated to reflect those changes.

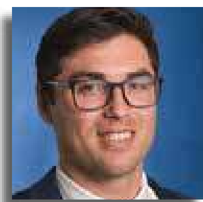
In renewing their FDDs, franchisors must now evaluate whether a material change has occurred in their historic FPRs.

Franchisors must also comply with anti-fraud provisions in state franchise registration and disclosure laws in states where those laws apply. These state franchise laws make it unlawful for a franchisor to make an untrue statement of material fact or exclude a material fact that would make a statement misleading when offering or selling a franchise.

Since Covid-19, regulators in states with anti-fraud provisions have heightened their level of review of FPRs to ensure a “reasonable basis” exists for the information contained in a franchisor’s Item 19.

Franchise strategies are best made after reviewing and analyzing Item 19 in an FDD. Contact Greg Schreiber at gschreiber@akclaw.com, if you would like to discuss the financial information a franchisor must disclose in the FDD or need assistance in analyzing the FPRs contained in Item 19 of a Franchisor’s FDD.

AUTOMOBILE INSURANCE



# Are You Covered?

By Joshua Baumann

In a perfect world, all 228 million U.S. drivers are adequately insured. If this were the case, when you are involved in a car accident that is not your fault - you would simply file a claim with the at-fault driver's car insurance company, get your car repaired and receive compensation for any lost wages or medical expenses. There would be no out-of-pocket expenses to you.

However, according to the Federal Highway Administrations Highway Statistics 2019, one in eight, or 28.5 million U.S. drivers are operating their vehicle without insurance.

So, what happens when a negligent driver crashes their vehicle into yours and that individual has low liability coverage or no insurance at all? Or, what happens if you are involved in a hit-and-run accident where the other driver leaves the scene?

While virtually all states require drivers to have auto liability insurance before they can legally drive a motor vehicle, the state liability limits may not be enough to cover all of the expenses in the event of a serious accident. This is where uninsured and underinsured motorist coverage comes into play.

Underinsured motorist coverage protects you if you are in an accident involving someone who does not have sufficient insurance of their own.

Underinsured coverage steps in when the at-fault driver doesn't have enough insurance to cover all the damages they have caused. A handful of states require underinsured motorist coverage, while more require uninsured motorist coverage.

In Nebraska, the mandatory requirements for uninsured/underinsured motorist coverage are $25,000 per person and $50,000 per accident for bodily injury liability coverage, and $25,000 per accident for property damage liability coverage. Far often, this is not enough, especially when you consider the average hospital bill following a car accident is close to $60,000.

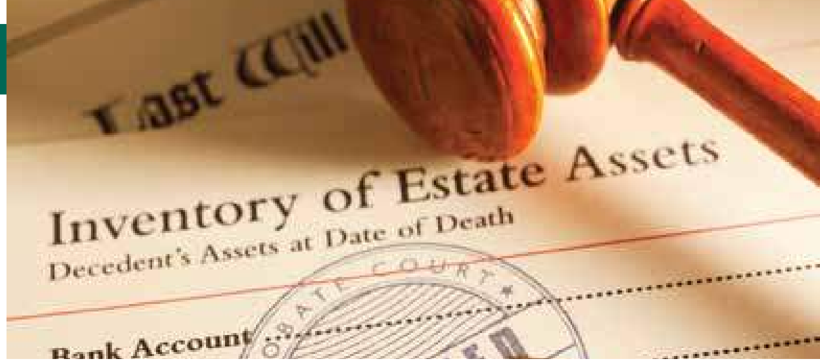
Drivers often choose to set their uninsured and underinsured motorist limits at the same level as their liability limits. All three types of coverage are designed to protect your financial assets from the expenses of a car accident, so the higher your net worth, the higher you may want these limits to be.

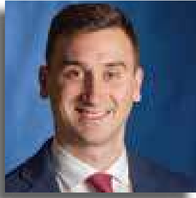
If you have been involved in a motor vehicle accident, you need to be sure you are receiving fair compensation for your damages. It is highly advisable to discuss the scenarios with an attorney who is experienced in these matters to help guide you through the process and help you obtain the fair compensation you deserve.

The attorneys at AKC Law can answer any questions you may have. Contact Josh Baumann at jbaumann@akclaw.com.

PROBATE QUESTIONS:

# What is an Inventory?



By Sam O'Neill

When grieving, the last thing anyone wants to deal with is a complicated legal and financial process. But that is exactly what happens when families go through the probate process after losing a loved one.

Probate is the legal process of administering a person's estate after their death. If your loved one had a last will and testament, probate will involve validating the will, collecting the decedent's assets, distributing the assets to the beneficiaries listed in the will, and paying applicable taxes. If a loved one dies without a will, the probate court will rely on the state's intestate law to determine how to distribute the assets. The probate process is intimidating. It can be overwhelming, and it is riddled with deadlines and filings that can be confusing.

In this article, and future articles, we will discuss questions that come up frequently at meetings with a newly appointed personal representative.

This quarter's topic is: **What is an Inventory?**

Put simply, an Inventory lists the property owned by a decedent at the time of their death. The personal representative of an estate must file an Inventory with the court within three months after the date of their appointment.

Three months is a tight deadline, but the court does allow for the filing of a supplemental inventory if a personal representative discovers property not previously included in the Inventory or learns that the value of an item was incorrect at the time of filing.

The purpose of an Inventory is to:

a) List the property of the decedent in reasonable detail;
b) Include an indication of the fair market value of each item listed at the time of the decedent's death;
c) List any loans or encumbrances against the items listed in the Inventory; and
d) List how the fair market value was determined. For example, Kelly Bluebook can be used to determine the fair market value of a vehicle or a home value can be based on the tax assessed value. If an appraiser is used, list the appraiser's name and address on the items that were appraised.

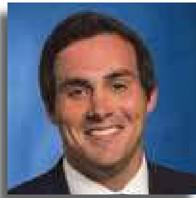
The most common items that are included in an inventory are:

- Bank Accounts – checking accounts, savings accounts, money market accounts, and CDs
- Real Estate – personal residences and investments properties
- Stock and Bonds – Brokerage Accounts, IRAs, etc.
- Retirement Accounts – Pension plans and workplace retirement accounts, 401(k)s, etc.
- Insurance policies – Life insurance if payable to the estate, annuities, etc.
- Business interests – Partnerships, corporations, LLCs, and sole proprietorships
- Personal Items – antiques, collectibles, jewelry, etc.
- Vehicles

Most of this information can be retrieved from the banking or financial institutions that the decedent used by submitting a written request along with a copy of the *Letters of the Personal Representative* that are issued by the court. It is also important to check for safety deposit boxes or safes which could include paper financial documents (stock certificates or bonds).

The preparation of an Inventory may sound like a daunting task and may include a little detective work, but it should not be feared. Gaining the assistance of a probate attorney will make the process easier. Abrahams Kaslow & Cassman LLP has been assisting families with the probate process since 1946. Contact Sam O'Neill at soneill@akclaw.com for more information.

# Could Colorado's New Notice Requirement Impact Your Business?



By Evyn Perry

Colorado recently enacted Senate Bill 22-234, which expands the notice requirements regarding unemployment insurance an employer must provide to an employee upon separation. While Senate Bill 22-234 only applies to Colorado employers, its application and any court challenges could serve as a model for other states to enact similar legislation. It could also be a guidepost for future federal legislation as the Biden Administration has focused on ramping up rule enforcement at the agency level and has made a commitment to expanding worker rights in both the public and private sector. With that in mind, employers in all jurisdictions should keep a keen eye on how this law unfolds in order to stay ahead of the curve if a similar rule comes to their state.

The requirement went into effect May 25th and requires the following information to be provided at termination:

- Employer's name and address
- Employee's name and address
- Employee ID or the last four digits of the employee's SSN.
- Employee's first and last date of employment.
- Employee's YTD earnings, and the employee's earnings for their last week worked.
- The reason the employee separated from the employer.
- A statement that unemployment insurance benefits are available to unemployed workers who meet Colorado eligibility requirements and contact information on how to file and check on the status of an unemployment claiims.

If you have HR questions, and would like to speak with an employment law attorney, contact Evyn Perry at eperry@akclaw.com.

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