

The Danger Factor in Receiverships: Be Smart

By Richard P. Ormond*

One of the most concerning aspects of representing receivers and their teams in a contentious receivership case is ensuring the safety of everyone involved. If a receiver is appointed, it is already an “extreme” situation requiring a court to appoint a neutral party to take custodia legis (legal custody) of a business, its assets or more. These situations have high emotions, high-stakes and, in some instances, irrational actors. Contempt can be a powerful tool to curb bad actors, but it is something that is sought well after the occurrence of a bad act.

For some it may seem inconceivable that legal and courtroom disputes can turn violent, but it does happen. As counsel for a receiver, I have had more than one person show up at my office with a weapon (baseball bats are a weapon of choice interestingly). I have been grabbed across tables during depositions, interviews and even once at a court-led settlement conference. I have received more insults than I care to remember. And, the worst, having someone whisper in my ear that they know where my kids go to school. Frightening to say the least.

PART I: INITIAL TAKE-OVER OF A BUSINESS WITH NOTICE

Here is my practical guide to precautionary methods we can take to protect ourselves in no particular order of priority.

1. Social Media, Geo-tagging, etc.

Minimize your personal information on-line and on social media and only share your information with your closest contacts. This is a hard one because we live in a world where social media is a primary form of communication. But, posting publically about your family, your neighborhood, your kids’ schools, your favorite restaurant, etc. provides a bad actor with a lot of personal information. Geo-tagging is also something to avoid. Tagging where you are invites unwanted visits or lets people know when you are out of town, or in the office. The outside world does not need to know where you are at any given time.

2. On-line Photos

Having your photo on-line is an important part of marketing and industry presence. However, it also helps people identify you more easily. Recently I had a matter that led me to take my official law-firm photo down. It has not been up since.

3. On-site Security Protocols

When taking over a facility, business, home or property there are a number of important factors to consider:

a. Security. Do you need to take security with you? If there is any aspect that makes you feel, even moderately, unsafe the answer is unequivocally “yes.”

b. Firearms. Can you identify ahead of time if there is a risk of firearms at the premises? If the answer is yes, do not take over the premises without law enforcement present (see below for instructions).

c. Advise Local Law Enforcement. Even if you decide not to involve local law-enforcement, it is prudent to let them know the time and location of your take-over. If need be, visit the local department and provide them ahead of time with a certified copy of the order. Many times, someone will call law enforcement and they will show up. If they know ahead of time that it is a civil order, being monitored by a court-appointed officer, they will defer to that process.

d. Certified Copies of Appointment Order. Take at least 5 certified copies of your appointment order and be ready to hand one out to law enforcement (if present), to the principals at the location, and to any lawyers that are also present at the take-over. Make sure to have one for yourself too.

e. Computer Preservation. First thing you do when you walk into a facility is unplug all computers, unplug all landlines, grab all laptops and tablets and turn off the Wi-Fi router. To preserve evidence properly, take a computer-forensic specialist with you to “flash copy” all of the hard-drives and to preserve all tablets. Originals can be sequestered, copied and “tagged and bagged.” You need to ensure that all chain of custody evidentiary rules are followed and documented. Once copied, if needed for operations, the original can be returned or it can be replaced with its clone—this will depend on a number of case factors including whether there is a parallel criminal investigation.

e. Cell Phones. If possible, identify all cell phones issued by the receivership estate entities or persons. Depending on the circumstances you may want to collect them and preserve them if they were used in the business of the receivership entity. Privacy issues come into play, so be cautious in doing this, and make sure it is authorized by the appointment order (or subsequent order of the court).

f. Locks. Change all locks. Front doors, closets, cabinets, safe combinations, mail-boxes, etc.

g. Forward Mail. Forward all receivership entity mail to your designated address. This authority should be spelled out in the appointment order.

i. Identify all Persons Present. Knowing who everyone is at the location (and present at your take-over) is important. If they refuse to identify themselves, ask them to leave the premises, but not before writing down a description and taking photos. Add these people to your list of “cast of characters,” which is a running list that I recommend you keep for each one of your receivership matters. It is a great source of information that you can regularly update so you have relevant and current information about the pertinent actors and so you can understand each persons’ relation to the estate.

j. Video/Security. Identify if there are video cameras (indoors and outdoors) at the premises. If so, you must immediately lock down the access to the video servers and records. Change all passwords, online access and preserve all records to-date.

k. Photographs and Video. While not always necessary to take video (although having someone on hand to simply video can be useful), taking lots of photos is critical. There may be accusations that a receiver disrupted a facility, removed documents, sequestered computers, etc. Therefore, you should carefully document with photographs and written notes (that are contemporaneous) what you identify, remove, review, inventory, etc. Later on, these photos will be helpful when preparing your initial inventory that is required by State and Federal law or rules.

4. Should you be armed?

This is a tough question to answer. I know of at least three receivers that have concealed weapon permits in California and another one that is seeking a concealed weapon permit. My own personal feeling is that only in the most extreme and dangerous situations (such as taking over a money-laundering ring, or a receivership that involves criminal actors) can justify being armed – legally, of course. Regardless, you should have law enforcement assistance and absolutely let law enforcement know that you or someone on your team is armed and then defer to their judgment.

5. What if I Need Law-enforcement Assistance?

Make sure that your court order has explicit language authorizing you and ordering local law-enforcement to assist at your discretion. The following language appears regularly in the appointment orders that I prepare and submit:

The Receiver is hereby authorized to enter any office of the receivership estate (using law enforcement or other personnel as necessary) to gain control of the receivership property.

ATTENTION <<<<>>> COUNTY SHERIFF, <<<<>>> POLICE DEPARTMENT AND ANY MUNICIPAL, COUNTY OR STATE LAW ENFORCEMENT OFFICER OR OFFICIAL.

In the event that the Defendants or their agents, assigns or affiliates do not cooperate with this Order and fail to provide access to the Receiver to any and all of the Receivership Property and its associated records required herein, the Receiver, without further order of this Court is authorized to seek the assistance of local law enforcement to enter any premises, sequester any records (whether digital or otherwise) and to otherwise enforce this Order.

Obviously, for a Federal Court Order you can include U.S. Marshals.

PART II: INITIAL TAKE-OVER OF A BUSINESS WITHOUT NOTICE

In some instances a receiver is appointed without notice. This is done in emergencies where assets are at immediate risk and notice to the alleged perpetrator will lead to further dissipation or secretion of such assets. These can lead to confrontations because you have a vexatious party that is already committing bad acts, and the shock of a “raid/takeover” without any notice to them can create stressful situations. In these instances, I cannot stress enough,

that law enforcement assistance should be mandatory. Again, take multiple certified copies of the appointment order and follow the list above.

What we do for a living is not always for the faint of heart. Safety for yourself and for the parties should always be paramount (lawyers included, of course).

If an appointment is under seal or without notice, usually it has a short time frame before it becomes public record. As such, it is important to have your team lined up and ready to go and that everyone on your team is discrete. Then, you must ensure, after your takeover, that any notice requirements are timely met.

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