

Profile of a Lawsuit

Jeffrey S. Nickloy, Campbell Kyle Proffitt
Fall 2002

Fortunately, not all of Campbell Kyle Proffitt's clients have been involved in lawsuits. However most, if not all, business owners or executives make decisions concerning the operation of their business with the knowledge that a mistake could lead to their company or its agents being drawn into a lawsuit. This letter is principally intended for those of our clients who have been fortunate enough to avoid being involved in litigation, as well as those who may have had only a passing experience with the judicial system. If a business owner has some feel for what it actually means to be sued or to sue someone, that owner will be better able to assess the risks of future conduct.

While all lawsuits differ in many important respects, the fact remains there are some striking similarities between them; often enough so that some general patterns are predictable. The first of these patterns is that once a lawsuit is filed the parties typically polarize their positions. If the other party was a "jerk" before the suit was filed, he becomes a total jerk after filing the suit. Lawsuits are very personalized criticism of behavior, so defendants are deeply offended and react in a very human and defensive manner. They often file counterclaims. The result is that in the first stages of a lawsuit, the chance to peacefully and inexpensively resolve the dispute all but disappears as the parties stake out their respective legal positions.

Most attorneys are prejudiced in favor of settling disputes outside of court. So, the issue of settlement normally reappears a few months into a lawsuit, as the lawyers begin their investigations. Unfortunately, these early settlement attempts are rarely successful.

The process of investigating a case can be very time consuming for both the lawyer and the client. Often the opposing party will demand information and documents which must be located, evaluated, organized and provided. This process normally requires a considerable amount of time to be spent by the client and the attorney. The client normally gets upset that the adversary with whom he is struggling can get access to all of this information, and force the client to spend his time and money in the process. Often the documents which must be turned over are highly sensitive or confidential, such as tax returns, personnel files and the like. But this is how the systems works — for both sides. So the attitude often displayed by the client is that there will be no settlement discussions until "the other side" is forced through the same process of responding to formal discovery requests.

The exchange of demands for information can go on for months. Some of the information is sought through written questions (interrogatories) and some through requests for documents. The attorneys also have the power to force parties and witnesses to provide oral testimony in the presence of a court reporter. These procedures can easily lead to thousands of dollars in legal bills for lawyers, court reporters and copying costs. Videotaping the depositions can push the costs higher still.

Normally, at some point in the middle of the formal investigation, the litigants begin to tire of the process. They become emotionally and financially drained, or at least recognize the enormous costs of time, money and emotion that are involved in this fight. Unless the circumstances which led to the suit are growing worse, the problem which gave rise to the suit seems increasingly less significant when compared to the cost of the battle. It is at this stage that litigation is often settled, but it is not unusual for the parties to have spent \$20,000 or \$30,000 or much more to reach this point.

In recent years formal mediation procedures have been created by the Indiana Supreme Court to help parties reach settlements and mediation is very often effective in doing just that. However, if no settlement is reached, the case will move on toward trial. There can be various motions made by either or both parties which can interfere with this process, and sometimes end the lawsuit, but this is uncommon.

If the case actually gets to trial there are many other ways in which the dispute can be extended afterwards. If the case is not tried to a jury, a judge may take months to issue a decision. And in any event an unfavorable result can be appealed by either side. If the litigants go through the full range of a dispute's possibilities, it can take several years from beginning to end. The cost of such a process can easily exceed \$100,000. In most cases, attorneys' fees and expenses are not recoverable by the prevailing party. Regrettably these costs do not diminish in proportion to the amount in dispute.

From the standpoint of a business owner the lesson to be learned is twofold. First, avoid the need to become a plaintiff or defendant in a lawsuit, and second, if you become involved, look for any avenue to get out as soon as possible. Certainly sometimes escape is not possible either because the other side is completely unreasonable or because there is a matter of principle or company policy at stake that cannot be

compromised. But in every case the terrible emotional, time and financial cost must be anticipated and resources allocated to help bear those costs. Better still is to take steps to avoid circumstances which can lead to litigation. That process can also be expensive, but it normally pales in comparison to the cost of litigation.