

Don't Hire a Swordsman When You Need a Gunslinger

BY MITCHELL A. KRAMER, ESQUIRE

If you are sued or if you are thinking about suing someone, you should know more than you have learned from watching *Law and Order* or *The Good Wife*. First off, it will probably take three years not sixty minutes. Second, every law school graduate is not a trial lawyer. We call trial lawyers litigators, gunslingers or sometimes egomaniacs. The lawyer who helped you buy your house, wrote your will, or did your taxes has probably only seen the inside of a courtroom on a tour of city hall.



Whether you're suing or being sued, you should have a litigator to represent you. As a MANA member, you have a list of litigators who already know a great deal about your business. If the suit involves something other than your business, the MANA-recommended lawyer may have the experience to handle it or recommend someone who can, or your friend, banker, accountant or relative may have a recommendation, as long as it is based on something of substance.

Most lawyers will meet with you initially at no charge for you to find out if you want him or her to represent you and whether the attorney wants to take your case. Ask the attorney what this is likely to cost you. If you are being sued, the attorney will probably bill you by the hour. I remember being in a case in which the opposing lawyer brought himself, a partner, two associates and a paralegal to our first meeting. He figured I would be overwhelmed by his army. I figured his client would be overwhelmed by the size of his monthly bills and would settle fairly quickly. I was right. Ask the lawyer how he will staff your case.

Be honest with your lawyer. Tell him or her the good and the bad. Surprises will kill lawsuits. I was trying an improper termination case for a manufacturer's rep. The defense was that my client did a bad job and therefore was properly terminated. At trial, the lawyer representing the manufacturer surfaced a letter my client had written to his salespeople telling them not to push that manufacturer's products too hard, because its quota was so low they would meet it easily and he was more worried about maximizing sales for his larger principals. The opposing lawyer had gotten that letter from a secretary my client had fired. My client had never told me about the letter or the ex-

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retary. If he had told me, I could have prepared him to deal with the letter at trial. But when faced with the letter, he stuttered and came up with a lame comment. I won the case, but my client got a much smaller award of damages than I had originally anticipated.

If your case doesn't settle, you will face a series of bombs and craters before you get to trial. Litigators use war metaphors. They prepare cases in "war rooms" and call themselves "gunslingers." Many of us are really intellectual geeks with mellow voices.

The judge can find for the other side at any time before you get to trial based on the pleadings or the discovery. Each party to the litigation must provide the other side with discovery. These are interrogatories (written questions you must answer under oath), document requests (you must give the other side documents it requests that relate to the case), requests for admissions, and depositions (face-to-face questioning of the parties and non-party witnesses under oath before a stenographer who takes down every word asked and answered).

Cases generally are really won and lost in discovery, not at trial. Barbara Kramer, my partner, and I tried a rep termination case in Texas where the national sales manager testified in his deposition to all of the terms of his representation that were agreed to at the beginning of the relationship. Since there was no written contract, his testimony was needed to pin down the territory and commis-

sion rate. At trial, the sales manager said that his deposition testimony was wrong. He said he had been mistaken because he had never been deposed before and had been confused. The jury obviously felt that he had been confused into telling the truth and was lying at trial. It awarded our client everything we had asked for.

If you are deciding whether or not to sue and you feel that you should go forward "as a matter of principle" my advice is to forget it. The lawsuit, with its expense and distractions, will last longer than your memory of what principle you were fighting for. Lawsuits should be brought if they are a matter of economic life or death — your single-most important principal has improperly terminated you — or if your case is strong and the potential damages are great enough to warrant the time and aggravation of the lawsuit.

If you are sued, you have no choice but to defend. However, your choice is whether or not to settle the case. Again, the decision not to settle should not be made as a "matter of principle." There is no such thing in litigation as a slam-dunk, every case can be won and every case can be lost. There is a natural tendency for defense lawyers not to advise their clients to settle. All lawyers are optimistic, but I have never yet met a defense lawyer who felt that my client was in the right. They can also rationalize their unwillingness to settle with the argument that if they do settle other people will be motivated to bring suit. I have never

found that to be the case, particularly since most settlement agreements provide that their terms be kept confidential. A defense lawyer may have an unacknowledged feeling that the longer the case runs the more fees he or she will be able to charge. If you are sued, I suggest that you make a rational decision as to the cost of defense, the odds of losing as against the amount for which you can settle, and then make a business decision as to what to do. If you are in business you will probably be sued sooner or later. It is simply a fact of business and should be dealt with in a business-like manner.

If you are in litigation, your lawyer should keep you advised of what is happening and he or she should always be willing to respond quickly to questions that you have regard-

ing your case. Your attorney should return calls promptly and willingly. But you cannot tell him or her how to try the case.

Litigation is time-consuming, frustrating, annoying and expensive. Even if you are the plaintiff and the case is being handled on some sort of contingency or modified contingency basis, it will still take time away from your business to respond

to questions, to be deposed, to attend settlement conferences, and to attend trial. Litigation is not the amusing game that television programs tend to make it. If you are thinking about litigating or have been sued, you should arm yourself with as much knowledge as possible so that you can deal intelligently with a situation different from the way you normally conduct your business. ☞

Mitchell A. Kramer is a partner in the law firm of Kramer & Kramer, LLP, specializing in issues affecting manufacturers' representatives and distributors. The firm has offices in suburban Philadelphia, Pennsylvania and Ann Arbor, Michigan. The firm has successfully negotiated thousands of contracts for sales agencies and recovered millions of dollars of unpaid commissions. Mitchell is a graduate of Dartmouth College and Yale Law School.

