

To Sue Or Not

By Derryl H. Molina, Esq.



ANYONE can file a legal complaint about anything, whether or not they have a chance of winning. The court will gladly take your filing fee. Additionally, anyone can find a lawyer to represent them, even if the lawyer knows they have no chance of winning. The lawyer will gladly take your money. But is it worth it?

People often feel wronged because they have an inaccurate view of themselves and their rights. One man wanted to sue because he was fired from an at-will (no formal contract) employment after receiving five negative performance reviews (moral outrage but no legal claim).

One child wanted to sue me for helping my client draft documents that didn't name that child as trustee (moral outrage but no legal claim). Another client changed his mind after I finished all the trust documents and wanted his deposit back; then threatened to sue me when I refused to return the deposit (again no legal claim).

So what is a legitimate lawsuit versus a temper tantrum? What do you need to be successful in a lawsuit of any type?

1. A legal claim of serious injury. This claim can be for a loss of

money, a lost job, a physical injury or even a loss of reputation caused by slander. Think: HARASSMENT vs. HURT FEELINGS. Think: BROKEN LAW vs. SHOULDN'T BEHAVE THAT WAY. An inheritance that does not happen or a job promotion you don't get qualifies as unhappiness, displeasure or inconvenience but is not serious injury and does not constitute a legal claim.

2. Written evidence or first-hand witnesses to the injury done to you. If it is your word against someone else's, the courts will ignore you. You need to have a signed contract that was violated or bank statements that show the unauthorized withdrawal of funds from your account or a photograph of the damage to your car. Hard evidence is essential to win.

3. A good lawyer you trust and communicate well with who works for you and is not sidetracked by your emotional issue.

4. A minimum of \$100,000 to pay your attorney up to and through a bench trial (by judge only). It could be double or more for a jury trial.

5. Unlimited time for consultations with your attorney, locate evidence needed for your case, attend court, review documents and be present at depositions and mediations.

Embarking on a lawsuit requires a change of your lifestyle. It takes over your life and you need to plan other activities around it.

6. A tough skin that allows you not to be damaged by the accusations leveled at you by the opposite party or the escalating costs and demands on your time. Finally, you need to be prepared to lose. You need to be able to pay your own attorney's fees and other expense and be prepared to receive a court order that you pay opposing party's attorney's fees as

well. ONE SIDE WINS AND ONE SIDE LOSES –every time. The loser could be you.

HOW TO AVOID A LAWSUIT

1. Don't let your ego get in the way of reaching a resolution.
2. Make multiple attempts to resolve your conflicts through sincere dialogue aimed at compromise.
3. If informal discussions don't work, engage a formal mediator. The Santa Clara County Alternate Dispute Resolution Program provides free mediation.

There are no winners in a lawsuit. Everyone loses emotional and physical health, money, time and some portion of the suit. Even if you prevail with the judge or the jury, you won't get back the time spent – up to many years – in preparation and trial. You won't recover all the financial cost to achieve a positive verdict. And the severed friendship or family relationship that was originally the basis of the conflict will never be healed.

As an estate planner, I like to counsel my clients to plan and prevent lawsuits. Even in families, communications and agreements must be in writing so there are no misunderstandings. A well-constructed estate plan and strong family bonds prevent hard feelings.

This should be your mantra: Out, out damned lawsuit! I want none of you!

Derryl H. Molina is an Elder Law Attorney who helps clients to reform and administer trusts and offers assistance with Elder Law and Medi-Cal planning. Call 408.244.4992 or email: attderryl@comcast.net.