

WHY YOUR BUSINESS MAY NEED A TRIAL LAWYER

Depending on whom you listen to, the word “trial lawyer” may carry a considerable amount of baggage. Television commercials, billboards and even bumper stickers often vilify them in sinister terms as “greedy” or “power-hungry,” pitted in mortal combat against the interests of businesses. But at the core, trial lawyers are no more than legal advocates who represent primarily plaintiffs – those who file civil lawsuits.¹ And their interests are not so diametrically opposed to those of business as you might be led to believe. In fact, there are numerous instances in which a trial lawyer might be your business’s best weapon in resolving a legal dispute. Consider this scenario:

ABC Canning, Inc., a local company, has entered into a contract with Big Giant Co., one of the nation’s leading canned food corporations. The contract provides that over the next 12 months, ABC will can 500,000 cartons of Big Giant green beans for distribution in supermarkets throughout the southeast. At first, the deal goes smoothly. However, during the second month of production, there is a significant delay because Big Giant fails to have the beans delivered on time. Consequently, ABC fails to meet Big Giant’s stringent canning deadlines. When it does, Big Giant abruptly cancels the contract and takes its green bean canning business to XYZ, Inc., one of ABC’s rivals, for a lower price. ABC has lost thousands of dollars in expected revenue. ABC’s President, Jim Jordan, first tries to negotiate with Big Giant on his own. But after his efforts prove unsuccessful, he becomes convinced that ABC’s only recourse is to sue Big Giant. Jim’s conviction is solidified when he hears through the grapevine that Big Giant’s contract with XYZ was executed even before the ABC delay occurred.

Remembering Monthly & Bill, the large law firm that defended a products liability claim filed against ABC the previous year, Jim calls Dan Hardaway, the partner who handled the case. After the usual preliminaries, Jim explains the situation and asks Dan to represent ABC in this dispute as well.

Dan sounds hesitant. “You want us to sue Big Giant? Well, I *can*, of course – have you tried working this out with them already?”

Jim is somewhat surprised by Dan’s reluctance. “Yes. I didn’t get anywhere. We’re going to have to sue them. They basically dared me.”

“Have you put your insurance carrier on notice?” Dan asks.

Now Jim is confused and becoming frustrated. “Why would I need to put my insurer on notice? We didn’t do anything wrong. ABC isn’t being sued, we’re suing them.”

“Right, right,” Dan apologizes, “just habit, I guess. You’re the plaintiff here. I understand.”

¹Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2nd ed., 1995).

Jim begins to wonder if he is doing the right thing. “Look, Dan, if you’re not comfortable with this....”

“No, no,” says Dan, “we’ll do it. What would you say to \$200 an hour?”

Jim gulps. “Two hundred dollars an hour? That sounds a little steep. I thought you guys would just take a percentage...”

“A contingency? We don’t normally do that kind of thing at Monthly & Bill. Plus, in a straight contract case like this one, it’s generally cheaper for you to pay us by the hour.”

“A straight contract case? Fraud is what I’d call it.”

“Well, we’ll look into all your options, but a fraud claim could be a little messy. Now, if you’ll just send us a retainer of \$10,000 to cover the first month, we can get started next week.”

“Retainer?” Jim sputters, “we’re already on a shoestring budget thanks to Big Giant.”

Now Dan’s voice tightens. “Jim, I’d really like to help you, but are you sure you really want to do this?”

While Jim’s experience with Dan might seem rather extreme, the situation ABC finds itself in with Big Giant is not. More and more, businesses are at odds with one another as the corporate climate becomes increasingly aggressive. In the past, most businesses rarely had occasion to sue each other except in collection actions. Today, however, sound economics demand that businesses step up to protect their interests against such widely varied wrongs as trademark, patent or copyright infringements, violations of trade secrets and corporate espionage, breaches of covenants not to compete, interferences with business or contractual relations, unfair competition and antitrust violations, as well as ordinary instances of fraud and breaches of contract. If it has been victimized in one of these ways or in some other way, your business will be the plaintiff in any action to recover against the person or entity that committed the wrong.

And who is better suited to assist your business in pursuing a remedy for these wrongs? As Jim was just beginning to learn, an attorney’s experience, reputation, personality, and financial understanding are crucial components of successful business advocacy in certain legal situations. For these very reasons, your business may want – even need – a trial lawyer.

Good trial lawyers are more able advocates for the plaintiff.

First, trial lawyers know the ins and outs of how a plaintiff’s case should be litigated. They regularly file complaints and have a good grasp of the proper strategies in dealing with multi-defendant suits. Defense lawyers usually view as burdensome the preliminary discovery process, in which the parties exchange written questions in search of information to develop their positions. But

a good trial lawyer knows that well written interrogatories and requests for production can be a key to the swift and favorable resolution of their client's claims. Defense lawyers are used to filing motions seeking to end a case before it gets to a trial. As their name suggests, however, a trial lawyer is skilled at preserving a case through such motions so that there can be a trial.

While experience in handling cases from a plaintiff's standpoint is helpful, the trial lawyer's ability to achieve success is not simply a matter of practice. Reputation plays a key role in the matter. A trial lawyer who has done well over a number of years will have attained a reputation that, in itself, may prove useful in prosecuting a civil suit. Opposing counsel will have heard of the successful trial lawyer's ability to obtain large jury verdicts, and may for that reason be more willing to enter into a favorable settlement earlier in the litigation. As it has been said, albeit in a different context, "a lawyer's reputation is his stock in trade." Even the most successful defense attorneys will have obtained a reputation, not for maximizing verdicts, but for minimizing them. Thus, their "stock in trade" may suffer in the context of conducting a plaintiff's suit, where their skills frequently remain untested. If your business is going to be a plaintiff, it is wise to consider hiring a plaintiff's attorney – that is, a trial lawyer.

Trial lawyers have a style of advocacy that might prove more useful in a given dispute.

Another major difference lies in the way lawyers try cases. A good trial lawyer knows how to stir a jury to action. With impassioned tones, the trial lawyer embodies the indignance that comes from a wrong that has yet to be righted. The goal is to inspire emotions, to prick the conscience, to light a fire. By contrast, the most successful defense counsel are those who soothe and calm a jury, who are able to soften the sound of the plaintiff's rattling sabers. Their demeanor is balm to heal the nerves and placate the senses of twelve people who are ready to take up arms against their clients.

A large part of this difference lies not simply in presentation or conduct before a jury, but in the lawyer's personality – who your attorney is as a person. It is no secret that most people are drawn to occupations that suit their personalities. The same is true within the legal profession, among categories of attorneys. Many of the most successful defense lawyers got to be that way because they have a naturally soothing, peaceful personality. What they portray to a jury is not simply an act, but a part of who they really are. On the other hand, many of the most successful trial lawyers got to be that way because they are naturally flamboyant and even fiery. They are naturally drawn to information and concepts that will bring emotions into play. They are capable, even more comfortable, representing the underdog, the little guy, the stepped upon. Trial lawyers may even prove more adept at defending suits in which your business finds itself in the underdog role, simply because of the approach the lawyers' personality and training will lead them to take. While there are certainly exceptions to this rule, in choosing your business's attorney, it is wise to consider which personality type you are likely to have representing your position in a given suit.

Trial lawyers are often more keenly aware of the financial concerns of their clients.

Importantly, trial lawyers frequently have a more realistic grip on the economic realities of businesses, particularly small businesses. Most defense lawyering is done at the behest of insurance companies who have a huge reserve from which to pay hourly attorneys' fees. They are not likely to be as concerned with the costs and expenses associated with litigation. Moreover, due to the amount of business that insurance litigation generates, many insurance companies are able to negotiate for lower attorneys' fees or for flat rate attorneys' fees, whereby they pay a certain dollar amount per suit. Not so for the small business owner.

As a result of their outlook on litigation, most defense lawyers believe in sparing no expense when it comes to defending their clients. While this quality may seem admirable in the abstract, the reality is much different when it is your business paying the expenses. Trial lawyers are used to looking for ways to maximize the value of a case while minimizing the costs and the amount of time spent obtaining a result.

One significant aspect of the American trial lawyers' legal environment is the contingency fee arrangement. While defense lawyers take cases on an hourly fee and sometimes require steep retainers from all but their most longstanding or most prolific clients, trial lawyers are much more likely to be willing to evaluate and accept matters on a contingency fee basis. While much has been made of the size of trial lawyers' fees, there is a much more significant risk to the lawyer – if your business does not win its suit, the lawyer gets nothing. Although the legal landscape is slowly changing as defense firms realize the mutual benefits of handling suits on a contingency, many firms are not comfortable with and even actively discourage handling cases in that fashion.

The benefits of a contingency fee arrangement to a business in a plaintiff's posture can be enormous. Lawyers operating on a contingency are more likely to work harder and more conscientiously to obtain a favorable result because their needs are more closely aligned with those of their clients. For the same reason, it is more likely that a trial lawyer will be able to properly evaluate the merits of a plaintiff's case and give a more straightforward assessment of your business's chances. If the suit is likely to fail, a lawyer operating on a contingency will be much more likely to reject the case. The contingency fee system also prevents the business from having to pay out large sums for costs and attorneys fees at a time (as in Jim's case) when it is already strapped for cash.

Conclusion

Objectivity in choosing an attorney is paramount. The wise business person will stand apart from the haranguing and political baiting that often accompanies the term "trial lawyer," and seek to do what is best for the business. And, as Jim was learning, what is best for your business is not always to phone the defense firm that the insurance company retained to handle your last defendant's case. Because a good trial lawyer has the experience, reputation, and personality for handling a plaintiff's role, and is more likely to be attuned to your business's financial needs in such

a situation, obtaining the services of such a lawyer may well be your business's best choice in handling cases in which your business is the plaintiff.

Simply put, representing a plaintiff requires a completely different mind set than representing a civil defendant. It is the difference between construction and demolition. A trial lawyer spends his legal career building suits, while a defense lawyer spends his legal career trying to tear them down. Therefore, ask yourself: which one do you need to represent your business in this legal dispute?

Rhon E. Jones is a 1990 graduate of the University of Alabama School of Law, and he manages the business/commercial litigation section of the law firm of Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. This area of the firm represents businesses in serious disputes with other businesses. Mr. Jones is a member of the Alabama and American Bar Associations, as well as the Alabama and American Trial Lawyer Associations. He is licensed to practice in the State of Alabama, the Southern, Middle and Northern U.S. District Courts in the State of Alabama, the U.S. Court of Appeals for the Eleventh Circuit, and the United States Supreme Court.