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Party to a Lawsuit: Five Things to Know When You Join the “Litigant Club”

Virtually no one I have ever represented told me they aspired to someday be involved in litigation. They were either sued by someone else or could not resolve a dispute short of a lawsuit. Either way, there was no real choice. They were reluctant members of the “**Litigant Club**”.

And once people have been parties in litigation, they tend not to repeat the experience. Such a dispute finds them only once, or perhaps, having participated once, they decline to ever put themselves in such a position again. People are unprepared for litigation when they start, and then do not have a place to apply what they learn. Most clients are not going to "get good" at litigation or develop a knack for it.

So here are five tips to orient you to club membership in the club you never wanted to join:

1. Invest Time and Attention:

Whether you are the plaintiff or the defendant in a case, you will have to invest your own time to convey facts to your attorney, respond to written questions from opposing counsel, have your deposition testimony taken and prepare for and attend a trial. You may have to take time off of work or rearrange your schedule to participate in proceedings. This may be irritating or create resentment if you do not commit ahead of time to be available to assist your attorney to prepare and present your case. Litigation is not convenient. One client finally found the emails that he had been telling me about at the very end of the case. They ended up being significant in resolving the case, but he had always been too busy to look through the archived email directory.

2. Listen to the Opponent:

Litigation is like a play, and you are one of the characters, but you only have part of the script at first--your part. You see things in a particular way, generally, "the way of truth." But by definition, in a lawsuit, there is another side to the story and that story is going to be told. Human psychology causes people to resist information that is inconsistent with their story or

perspective. That phenomenon is called cognitive dissonance. Resist the tendency to explain away or defend or ignore the adverse position as "stupid" or "a lie." You need to help your lawyer understand why the other party is taking that position in order to defend against it. Don't be blindsided by a legitimate argument you dismissed as "dumb."

3. Protect Information:

You are not anonymous, especially in the world of social media. Do not talk about your lawsuit or the facts of the case or the other party or what your lawyer said--especially not what your lawyer said--or how the court screwed up a ruling. First, this kind of conversation will make you unpopular at cocktail parties and is about as interesting to others as hearing results of your recent medical screening. More seriously, it can undermine your case. Lawyers on the other side take special delight in finding Facebook or social media discussions of what you "plan to do with the money from the lawsuit," or anything inconsistent with what you want to present in the case. Worse, you may compromise the protection you get in the attorney-client relationship. If you spread information outside of that relationship, it may no longer be protected. Have the discipline to keep it confidential.

4. Embrace Reality:

Television and Netflix have made real lawyers and real litigation look very boring and super slow. If you expect home runs in every deposition or consistent high-five moments, you will be disappointed---and did I mention bored? Gathering evidence, committing the other side to a position, involving the court when necessary in preparing a case are all part of the process of litigation. It is like piecing a quilt. We often say that even in trial where you present the finished case, there is relative excitement for only about 5 minutes per trial hour. And the case goes at a certain speed, which is fast to me when deadlines approach, but has seemed slow to virtually every client I have ever represented. Of all of the things to be impressed with, speed has never made the top of the chart. Another upsetting reality is that evidence, witnesses, and the court are fluid. One deposition might go perfectly and another will present unanticipated obstacles. A trial lawyer truism is that in every case, "there is the case you file, the case that develops in discovery and the case that gets presented at trial."

5. Beware the Prize:

What I know for a fact is that no matter how resounding the victory or how much we high five when a verdict comes in, my clients hope they do not ever have to see me again. (They always say "no offense.") I remind them of a time of stress, uncertainty, and black clouds. A retired U.S. Magistrate used to say that the best case he ever saw was only 80/20. Your bottom line evaluation should be: a) is the risk worth the possible reward, because there is always risk even in the best case, and b) can you tolerate each of the possible outcomes, even the unlikely bad ones? You should not be afraid to recalibrate during litigation, to reevaluate your case, and to redefine a successful resolution. The same well-regarded U.S. Magistrate said that a successful settlement was one where both parties left the table equally mad. Even a win isn't always rosy.