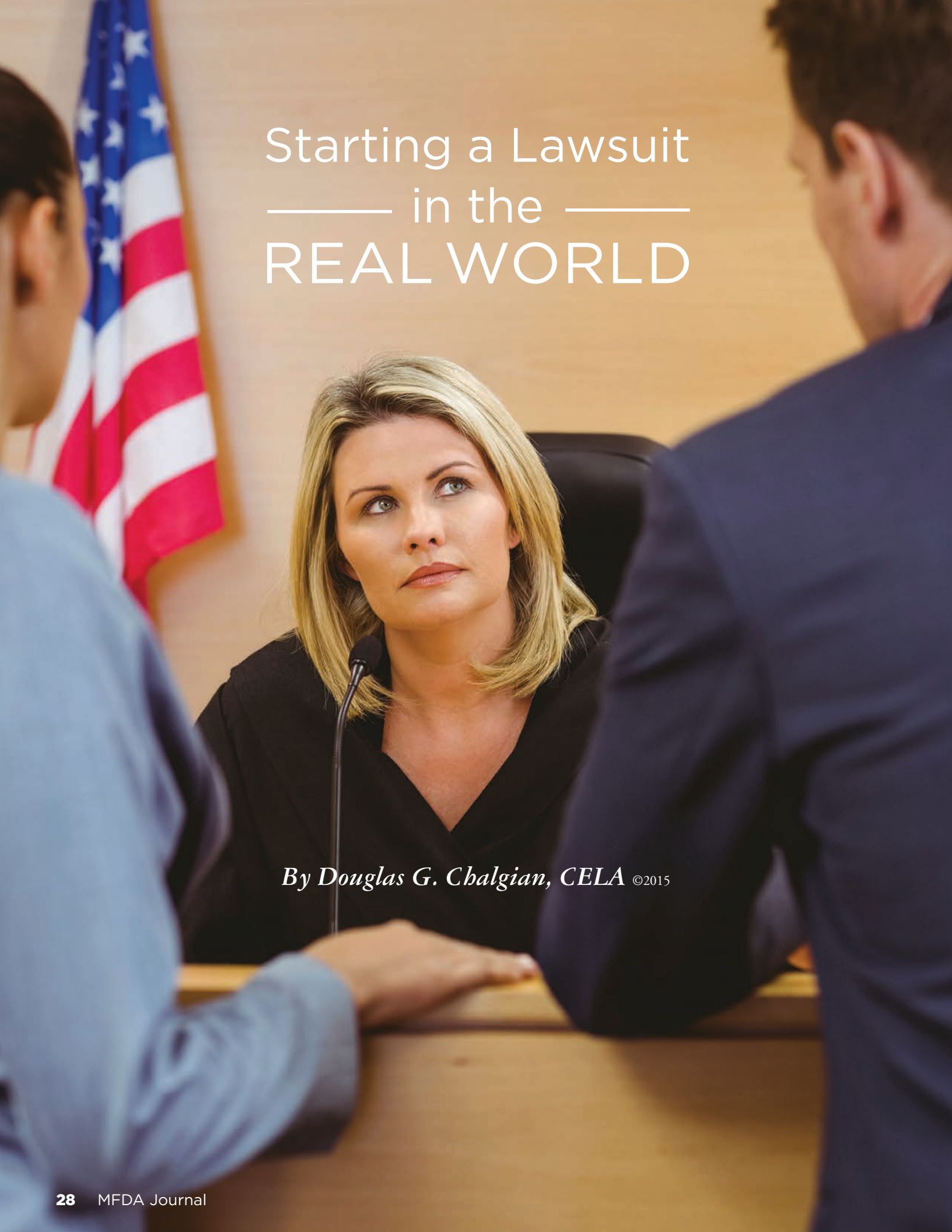
Starting a Lawsuit in the REAL WORLD



By Douglas G. Chalgian, CELA ©2015

One of the more frequent conversations I have with clients these days comes up with people who are considering starting a lawsuit. Because of the nature of my practice, the type of lawsuit we are discussing would typically involve things such as: contests about wills and trusts, guardianships over impaired adults and cases involving financial exploitation of vulnerable adults. But I suspect the conversation we have would be similar if we were talking about other types of lawsuits.

First, the terms "lawsuit" and "litigation" mean invoking the authority of a court to decide a dispute, as opposed to clients who want me to draft their estate planning documents, or prepare deeds or contracts for them—work that does not involve court actions. The distinction between these two types of legal work is significant. In England and Canada, for instance, they distinguish between "barristers" (who go to court) and "solicitors" (who do not). In the U.S., the same distinction exists, but is less commonly recognized by the public. We tend to use the terms "litigators" and "transactional lawyers."

The Decision to Sue or Let It Go

People understandably look to courts to fix their problems. However, this is not like TV, where complex disputes are resolved in 30 minutes and the process is filled with drama. Rather, the legal system (or the wheels of justice) is more often compared by those who practice to the "mills of God" as described in lines from a poem from Henry Wadsworth Longfellow: "Though the mills of God grind slowly; Yet they grind exceeding small." In the real world, the legal process is slow, expensive, and emotionally draining. While the legal process may be the only way to fix some problems, in other cases it may simply be too expensive, too risky and/or time consuming.

Litigation is expensive. Typical cases cost tens of thousands of dollars in legal fees and expenses. While some may be less costly, other cases cost more. Accordingly, to justify litigation, there must be a sufficient amount of money in dispute. Whether an attorney will consider taking a case on a contingency basis (be paid a percentage of the recovery) will depend on the facts of the case and the amount of money at issue.

Regardless of the financial cost, those considering litigation need to appreciate that many cases take a year or more to resolve, and that the process is typically both time consuming and emotionally draining. At the outset, you need to decide whether you are "up to the fight," or, after thinking it over, you may decide that you have better things to do with your time, money and emotions.

Another important factor in deciding whether to proceed with litigation is the strength of your case. That is, what is the likelihood of a favorable outcome? While it is never possible to tell how a case will come out based on an initial consultation with clients and review of documents, even at the early stage an experienced attorney can identify the strengths and weaknesses in a case.

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Lawyers always separate in their minds the facts and the law. The facts are unique to each case. The law is the same. It is the combination of the facts and law that determines the strength of any case, and it is the ability of an experienced attorney to combine the law with the facts to present the strongest case. That is the reason you seek qualified counsel. While you will likely know the facts of the case better than your lawyer, your lawyer will know which facts are legally significant based on the law.

The Importance of Legal Theories

If you decide to proceed with litigation, your attorney will begin the process of developing the legal theories that can be pled. For instance, many cases involving the financial exploitation of vulnerable adults, or cases in which the validity of wills, deeds or trusts is being contested, the primary legal theories will include "lack of capacity" and "undue influence."

As an example, if an elderly person signs a deed or trust amendment benefiting a certain nephew, and the validity of that document is challenged, the party challenging the document will have to allege that the elderly person didn't understand what they were signing (lacked sufficient capacity), or that they were coerced into signing it by someone who had power over them sufficient to overcome their ability to make decisions independently (undue influence).

In most cases there are multiple legal theories. Each theory is selected based on the facts, and each theory will then determine what allegations need to be made, which party has the burden to prove their case, whether there are any presumptions to be applied, and what types of remedies are available to the court.

The Life of the Case

Once the decision is made to proceed and the legal theories are identified, the complaint or petition is prepared, and the case is ready to be filed. [In some cases, clients come in after documents have been filed in court. Those clients are looking to retain a lawyer to represent them with respect to the allegations made in those court filings.]

The Initial Pleading

A case starts when an initial pleading is filed. This may be a complaint, or this may be a petition, depending on the nature of the action. Likewise, depending on the nature of the action, the case may be filed in the probate court or the circuit court.

Once a complaint or petition is filed, it is incumbent upon the adverse party to respond. Michigan's "Court Rules" dictate when such responses must be filed. During this initial process, the nature of the case and its legal theories are disclosed. Also at this stage, the identity of the judge, as well as the attorneys and firms that will be involved in the case, are made known.

Different judges handle cases differently. Different lawyers and firms have differing levels of experience and expertise. Who the judge is, and who the attorneys are, will have a significant impact on how the case proceeds.

Scheduling Orders and Discovery

Once the initial pleading and response are filed, the process of "discovery" begins. In discovery, each party has tools (subpoenas, interrogatories, depositions, requests to admit, and requests for production of documents) that allow the parties to gather information necessary to build their case and to evaluate the strength of the case of the opposing party.

A subpoena is typically issued to an institution, such as a bank or an accountant, requiring them to produce records in their possession that are relevant to the case.

Interrogatories are written questions issued to other parties to the case, which they are required to answer.

Depositions are meetings at which a witness is put under oath and questioned by the attorneys involved in a case. The judge is not present for depositions, but the testimony that is given in deposition may be used in motions and for cross-examination at trial. Depositions are critical in most cases, in that they allow the attorneys to find out what witnesses will say if called at trial, and in almost all cases the parties themselves are deposed.

A request to admit is a document that one party can send to another party, laying out specific factual allegations. The party who receives a request to admit must admit or deny each of these statements of fact.

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A request for production of documents is a demand by one party to another party to produce documents that may be relevant.

Also, at the outset of the case, the court issues a scheduling order. This order provides the timeline for the case, setting deadlines for discovery, for motions, mediation, and for exchanging witness lists and exhibits. A scheduling order may also include a tentative date for trial, although many judges don't pick a trial date at this time. Instead they schedule a status conference for later in the process, when parties are better able to estimate the likelihood of settlement and how long the trial

might go if it is needed. The scheduling order also typically identifies the deadline for a party to request a trial by jury.

Motions

While the case is pending, that is, before trial, parties may file motions. These motions can relate to any aspect of the case, such as compelling a party to comply with a discovery request, or to preserve assets in which the ownership is in dispute.

One type of motion is called a motion for summary disposition. A motion for summary disposition is a motion that says there is no need for a trial on all or some of the case, because, having now engaged in discovery, it is clear that there is no real dispute on a particular issue.

Sanctions

In the U.S. system, the general rule is that each party is responsible for paying their own legal costs. In most cases, a party may only be ordered to pay the other party's legal fees if the judge decides that the party filed documents with the court containing allegations that were frivolous. Clients tend to believe that this standard applies way more often than judges do. Judges are typically hesitant to award sanctions against a party, and when they do, the amount of the sanction rarely makes a significant difference in the costs of the case.

Settlement and Mediation

Throughout the case, the parties are free to try to settle their dispute. Most cases settle. Only a small percentage of cases actually go to trial. Some cases settle because after the parties have engaged in discovery, they are better able to evaluate the strengths of their respective cases.

In addition, most judges require parties to engage in a formal settlement effort before trial, called mediation. In mediation, the parties and their attorneys meet with a neutral facilitator who attempts to bring the parties together to reach a settlement that both sides can accept.

Trial

When discovery is completed, and if a case has failed to settle, the judge holds a trial. The trial is what most people recognize from movies and television. The judge sits in his/her seat at the front of the courtroom and the parties call their witnesses and enter their exhibits.

Trials can be bench trials (where the judge listens to the evidence and decides the case), a jury trial (in which a jury is selected to make decisions), or a combination of both (where the jury decides some issues and the judge decides some issues). The legal theories and facts of a case will determine what issues, if any, can be tried by a jury. Even in cases where a jury trial may be available, the attorneys may elect to have the judge decide the case.

Trials can take days or weeks, depending on the complexity of the case, and the number of witnesses and exhibits involved. Although a jury will typically rule within a relatively short period of time, a judge may take weeks or even months to issue an opinion (decision), after completion of a trial.

Appeals

While all cases can be appealed, in almost all cases it is a bad idea to rely on "winning on appeal" as a means of winning a case. Appellate courts are hesitant to upset a decision made by a jury or trial judge who was able to hear all the witnesses and weigh their credibility. That said, it is not unusual for "higher courts" to overrule some part, or all, of a "trial court's" decision, particularly if the judge applied the law incorrectly.

Conclusion

Litigation isn't right for every dispute. People considering "going to court" to resolve their differences are well served by meeting with one or more experienced attorneys and obtaining an opinion about the case. They can then determine whether the costs, time and emotions that they will invest in the process are justified by the prospects of a favorable outcome.

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