

THE C & D NEWSLETTER



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TO LITIGATE OR NOT TO LITIGATE?

That is the question most frequently pondered in the area of dispute resolution. Litigation is an imperfect process at best. Winners are often left with pyrrhic victories; losers sometimes lose that which they have struggled to achieve over the course of a lifetime. This Newsletter explores the considerations that are taken into account when deciding whether to litigate; in future Newsletters we will explore alternatives to litigation and preventive measures by which disputes can be resolved before the question of litigation ever arises.

What is Litigation? Litigation is modern society's alternative to dueling and fisticuffs. It's quieter and more peaceful, usually less bloody and typically, no one dies in the process. Litigation is the process by which a person's grievance is set forth in writing and presented to an impartial tribunal for hearing; before hearing takes place, and after both sides have filed their papers with the court, each side has the opportunity to utilize various procedures to gather evidence and locate witnesses. Knowing which mechanisms and procedures to employ often makes the difference between success and failure in litigation.

The Advantages of Litigation. Litigation is orderly. It is a socially acceptable means of resolving disputes. The process is legitimized and enforced by those in whom we have vested authority and power. Thus, an Order or Judgment by the Court will be enforced by law enforcement officers. Numerous mechanisms and procedures are available from which creative and appropriate remedies can be fashioned. Litigation is almost always perceived as a meaningful threat and conveys to the opposition that the aggrieved party is, indeed, serious about getting satisfaction. Initiating litigation is often the first step in meaningful settlement negotiations.

The Disadvantages of Litigation. It has been said that in law, "nothing is certain except the expense." Hourly rates for litigation counsel range from \$150 to \$450 per hour. The average lawsuit, pursued through trial can take from 100 to 250 hours, depending on the complexity of the issues, the number of witnesses, the quantity of documentary evidence, and other factors. To travel the path of litigation from start to finish is expensive. While the "other side" is sometimes ordered to pay the prevailing party's legal expenses, this does not always result in making the prevailing party whole. However, because most litigation settles before trial, fees are often less than projected.

Nothing in the law is certain. No one can ever predict the outcome of a case. A clever advocate can always argue a contrary interpretation of facts and/or present technical obstacles to the aggrieved party's presentation of "the truth". Cases publicized in the media often illustrate the point well. Thus, no matter how righteous an aggrieved party's position may be, he/she may, for reasons unforeseen, not prevail in court. Delay is another problem to consider in litigation. Where it used to take five years to get to trial (because of the overcrowding of the court's docket) it now takes between two and three years to get to trial. The delay takes its toll in emotional stamina and financial drain.

When Should Litigation Be Pursued? Litigation should be considered a measure of last resort; while it can serve as a "tool" in the negotiation process, it should only be pursued by those who have exhausted reasonable alternatives (e.g. mediation, negotiation) and where, after careful analysis, it is determined that the risk of loss, projected expense, and emotional drain are outweighed by the prospects for a favorable outcome.

This complimentary newsletter is intended to provide general information. Because of the complexities and constant changes in the law, it is important to seek professional advice before acting on any of the matters covered herein.

