



**CLIENT MEMORANDUM
LITIGATION: THE PRACTICAL CONSIDERATIONS**

Litigation involves more than just the law. There are a number of down-to-earth problems that must be addressed. This memorandum has been prepared for our clients to draw attention to some of these issues. This memo will consider:

1. The cost of litigation;
2. The time involved in litigation;
3. Some circumstances when litigation is not appropriate; and
4. The importance of settlement.

The Cost of Litigation

We are allowed in Ontario to charge contingency fees. A contingent fee is one where the fee is directly related to or dependent upon the lawyer achieving success in the litigation. Under this form of fee arrangement, the lawyer will charge you a certain percentage of your settlement. The percentage varies on a case by case basis. This issue is more thoroughly discussed in our Costs and Accounts memo and the Retainer Agreement we will have you sign.

Lawyers are entitled to be reimbursed for the expenses or disbursements that they incur on behalf of their client. Often the client will also incur expenses associated with the litigation. These expenses may include the cost of hiring consultants or expert witnesses to help prepare the case.

There is additional cost associated with failure in the litigation. An unsuccessful party may be required to pay all or part of the legal costs of the other party. As a general policy, full compensation for costs is not usually awarded. (The general policy is that if full compensation were awarded in every case, then access to the courts would be unduly inhibited. Partial compensation for costs thus strikes a balance.)

Even if a party is justifiably optimistic about the eventual outcome of the case, the significance of costs should not be ignored. While that party may succeed and recover costs from the other side, as already noted, those costs will likely not be full compensation. Moreover, there



is also the possibility that the other side may not have any or enough money to pay the costs. Finally, it should be noted that there is generally no recovery for the value of the time that the party itself dedicates to the litigation.

Whether or not a party succeeds in the litigation and whether or not the other side pays the costs, the client remains primarily responsible to his or her lawyer for payment of the legal fees.

The Time Involved in Litigation

The *Rules of Civil Procedure* contain a number of provisions designed to shorten the time it takes to obtain a final court decision in a civil dispute. Nevertheless, there are a number of factors that may slow the litigation. The Rules require that the parties disclose their case and the relevant documents. Especially where there are numerous documents or many issues in dispute, the completion of pleadings and the disclosure of documents may be protracted. It also often takes considerable time to make the arrangements for and to conduct the examinations for discovery. The parties, the lawyers, and court facilities are not always available and this also causes delay throughout the course of the litigation.

Some Circumstances When Litigation is not Appropriate

It is unethical and abusive of the court system to advance a claim or defence that a party knows has no merit. In such circumstances, the law will impose cost penalties. However, even if there is merit in the claim or the defence, it is not always appropriate to litigate. In the majority of cases, a party should adopt a practical and business-like view of the litigation process and consider the value of what may be achieved balanced against the risks and the costs, including the cost of time, associated with proceeding. This attitude is particularly important at the beginning of the case because it becomes more and more difficult to extricate oneself from litigation as the proceeding matures. It is also important to consider the financial solvency of the other side since the success does not guarantee that the other party will have the money to pay the claim or the costs.

The Role of Settlement

The practical reality is that most cases settle and are not tried. This reality reflects the costs of litigation, the time involved, and the risks associated with pushing a matter on to trial. Even with the best claim or defence, there are such intangibles as the impression that a witness may



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make when under the stress of a court attendance, the temperament of particular judges, and the possibility that the result may not follow established paths but make new law.

To obtain a good settlement, it is necessary to convince the other side of the merits of the case and the weakness of the opposition. This is just another form of advocacy and requires preparation, hard work, persistence, and skill. As individuals, litigation lawyers probably enjoy most of the contest and competition of actual trial work, but, as professionals, litigation lawyers realize that their clients are often better served by achieving a favourable settlement of the case.

I HAVE READ AND UNDERSTAND THE ABOVE

Date

Signature

CHRISTOPHER D.J HACIO

I acknowledge receipt of two copies of the within letter acknowledging that I have read it carefully and understand the contents and agree to the terms and conditions of your retainer and the basis of your Statement of Account as set forth in this letter and the memorandums that were sent to me along with this letter.

Date

Signature

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