

To sue or not to sue

Tips to help decide if litigation is right for you

Abraham Lincoln declared: "Discourage Litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses and waste of time." As well, the French philosopher, Voltaire said, "I was ruined twice: once when I lost a lawsuit, and once when I won."

But we need to understand these statements. Don't disputing parties have a right to go to court and have an independent, disinterested judge or jury decide their fate and create a binding legal precedent? Isn't it precisely the foundation of our adversarial system of litigation where two or more disputants who are often extremely uncooperative—even hostile to the other—present their cases to a decision-maker who considers the evidence and arguments and proclaims one side victorious?

Indeed, the courts are where truth and falsehood are engaged in mortal combat: where truth will successfully emerge, and where justice will be served, thereby benefiting society as a whole. So why should adversarial litigation not be encouraged? And why can't the goals of the adversarial system of litigation be achieved in every case?

The realities of litigation

There are several reasons why traditional adversarial litigation may not be right for you.

Cost: Litigation typically costs more than resolving a dispute through the disputing parties' own efforts, with or without the help of lawyers. Disputants can also look to a mediator or other expert who can help with a fair resolution of the dispute. As Voltaire said and others have agreed, winners of lawsuits are often losers in terms of paid out legal fees and disbursements, other expenses, wasted time, not to mention increased stress and frustration, as well as ruined personal and business relationships.

Risk: Trial decisions are inherently uncertain, and jury trials unpredictable, compared to negotiated settlements or those that are mediated.

Delay and inefficiencies: More often than not, litigation does not lead to an expeditious, efficient or cost-effective resolution of the dispute. Delay and the costs that it brings are inherent in the trial process.

Public exposure and lack of confidentiality: Unlike private dispute resolution processes such as negotiation and mediation (which are confidential) court proceedings are generally conducted under the gaze of the public eye.

Many corporations and individuals prefer to avoid such public exposure. This in turn avoids the risk of adverse public opinion when it comes to their legal matters.

Winners and losers: In a litigated case, a third party such as a judge or jury renders a decision that declares one of the parties the winner. Meanwhile, that means the other party is the loser. But where the parties resolve the dispute on their own terms, they can structure a win-win solution. This solution can be more creative, more flexible and sensitive to the needs of both parties than a traditional litigated outcome.

Think strategically

Deciding whether litigation or an alternative dispute resolution process is right for you as a method for dealing with a dispute requires you to make a strategic decision. To make such a decision, it's wise to do the following:

- Investigate the facts, formulate the issues, and define the problem;
- Identify your goals and objectives and prioritize them;
- Generate alternative courses of action and possible solutions;
- Assess the costs and benefits of each course of action according to how well they satisfy your objectives;
- Consider your financial situation, risk profile, as well as social and psychological makeup; and
- Make your decision using the most appropriate dispute resolution process. These can include negotiation, mediation, or adjudication (such as through a judge, jury, or arbitrator).

There is a time to negotiate, a time to mediate, and a time to litigate. There is also a time to walk away—or even run—from a dispute. The key to making the decision regarding which is most appropriate is to have the practical judgment to know, or seek professional advice, regarding the right time (as well as the wrong time) for each. **MM&D**

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