



## So You Want to Go to Court by Dennis M. Foerster

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You feel you have been wronged. You believe that someone has breached the terms of the contract or that you have been the victim of someone's negligence and you want to be compensated. Any and all attempts to resolve the matter yourself have been unsuccessful and therefore you have contacted your lawyer.

Your lawyer should explain to you that going to court, if necessary, could be expensive. In fact it was once explained to me by a senior litigator that, unless it is an open and shut case, then if your claim is worth less than \$40,000 it may not be worthwhile proceeding with the expense and uncertainty of a trial. That advice still shocks me, but I have grown to appreciate its fundamental accuracy.

Basically going to court for civil litigation claim has three separate components; the preparation of the pleadings, the pre-trial process and the trial itself. Each of these involve both time and expense. In fact in most cases the trial itself and preparation for trial is usually less than a third of the actual costs.

A lawyer can only sell you two things their expertise and time. In most cases your lawyer will

charge according to an hourly rate. Ultimately what determines the costs of the matter is its complexity, finding and preparing the evidence, whether it be documents, experts or witnesses, and preparing for the hearing. Interestingly, the expense of litigation as well as the pre-trial procedures results in many claims filed never seeing a court room; less than ten percent of claims filed ever go to trial.

The reason for this is because the pre-trial discovery process allows each side to see how the other side will pursue or defend a claim. Counsel should always be assessing the strength of their case. Generally there are three times when a claim will settle. A claim may settle upon the other party being served with a statement of claim. Sometimes when a case is obvious opposing counsel or an opposing party will immediately commence settlement discussions. The second opportunity is during or after discoveries.

Discoveries allow parties to see the strengths or weaknesses of each other's case. One of the purposes of the discoveries is to assess the credibility of the other party. If a lawyer assesses the other party as being a strong witness or in the alternative not

very credible, the parties should engage in settlement discussions. Finally, cases are often settled just before the commencement of a trial. Often cases are settled on the court room steps. Although the parties have incurred the majority of costs by this point in time, stepping into a court room has a sobering effect on litigants and in and of itself will be a motivating event to settle a claim. Trials are not fun for anyone and there may be a value over and above the actual costs in avoiding one.

One final reason to attempt to settle a matter before proceeding to a trial is, if you are a plaintiff, that you will often get your payment sooner rather than later. Even if you are successful at trial what you will get is a judgment and not necessarily the amount you have been awarded. If the defendant does not have assets or declares bankruptcy during the pre-trial process or after judgment you may not be able to have your judgment satisfied. It is important to have your counsel investigate and ensure that not only do you have a strong claim but that the defendant will have assets or the ability to satisfy any judgment obtained. It is very frustrating to have obtained a judgment, incurred all the costs

to obtain the judgment and then realize that although you are right and shown to be right you will not be able to have your judgment satisfied.

Although you may think you have a strong case it can never be determined in advance how successful a party will be. Going to court always represents a risk and settling a matter will provide certainty and finality. In assessing any settlement offer your lawyer should be attempting to both minimize your costs and maximizing your return. Often a client, because of anger or a personal connection with a matter, will not consider these issues. At the end of the day, it may make no difference to the lawyer whether you pay him or her or the opposite party. The lawyer however should ensure that you either pay the least to either the lawyer or the other party or obtain the most.

The litigation process is at times slow, expensive and often not a very satisfying experience. It should be avoided as a solution unless no other option is available and it is financially viable to pursue. Your lawyer can assist you in determining both of these issues, but in the end it will be your decision on whether or not to proceed.

Make sure that you and your

lawyer have discussed these issues at the outset in order to avoid conflicts with your own lawyer down the road. A lawyer should fully explain the costs and risks of commencing an action. The decision however to proceed with a claim is always with the client, but the client needs to make this important decision with the necessary information and with their eyes open.