Information & Instructions: Summary of the litigation process for a collection matter

1. This letter provides a long and detailed summary of the litigation process and what to expect in a litigation matter. It ascertains that the client has been informed of the risks and pitfalls that can occur in a lawsuit.

2. Send this letter to the client prior to commencing litigation. The letter explains, in detail, the litigation process so that the client can make an informed decision concerning whether or not to litigate the matter. Have the client sign the acknowledgement form.

Form: Summary of the litigation process for a collection matter

[Date]

[Client's name]
[Client's address]

ATTORNEY-CLIENT COMMUNICATION: THIS DOCUMENT AND ITS CONTENTS CONSTITUTE LEGALLY PRIVILEGED INFORMATION

Regarding a Summary of the Litigation Process

Dear [Client's salutation]:

The purpose of this letter is to review with you the litigation process so that you will be able to make an informed decision to resolve your dispute.

1. Litigation. Litigation is the process of filing and prosecuting a lawsuit. You may file a lawsuit in state or federal court. You may also have your matter heard pursuant to an alternate dispute resolution method, such as arbitration, mediation, or short trial process.

(a) Suits in state or federal court are subject to very technical rules of civil procedure and evidence. They generally take longer to process and are more costly than alternate dispute resolution.

(b) Alternate Dispute Resolution. Alternate Dispute Resolution may or may not use the Rules of Civil Procedure and Evidence. Generally, even if said rules are used, the enforcement is more informal and less technical.

2. Groundless Litigation. If a party files a lawsuit that is groundless or done in bad faith, the Court can assess sanctions and penalties against the attorney and the person that filed the lawsuit.

(a) A bad faith lawsuit is one in which there is no or little support for the claim being advanced and the Court determines that the same was filed for the purposes of delay, harassment, or no just cause.

3. Litigation versus Arbitration. Some parties choose litigation in state or federal courts over arbitration because they have the right to select a jury; if they are unhappy with the decision, they have the right to appeal to a higher court.

(a) In a matter where a jury trial is allowed, you have the choice of having your factual disputes decided by a jury instead of a judge.

4. Jury Selection. In a jury trial, prospective jurors are placed on a panel.

(a) The attorney or judge asks the prospective jurors questions. This is called the voir dire process.

(b) If it is shown during voir dire that a prospective juror should be disqualified due to bias, prejudice, pecuniary interest, etc., the attorney may strike that juror for cause. This means that the juror is excused from serving on that jury.

(c) In addition to strikes for cause, each side has a certain number of peremptory challenges. This is where the attorney and client determine which jurors they do not want to serve on the jury panel based on the answers given by the prospective jurors during the voir dire process. No reason must be given for exercising the peremptory strikes.

(d) After the voir dire questioning is completed, the parties then select the jury. This process is sometimes considered to be an art rather than a science since studies have shown that jurors do not always volunteer information that is essential in selecting a jury, nor do all jurors always give truthful answers.

(e) Since the time is limited in which to question the jury panel, it is usually not possible to fully obtain all of the facts desired in order to select a jury.

(f) Accordingly, jury selection commonly boils down to attempting to ascertain which prospective juror may be the most harmful to your case, and then striking said juror either for cause or through peremptory challenges.

5. Jury Considerations. The advantage of a jury trial is that the jury, rather than the judge, decides the factual issues.

(a) Depending on the court, six or twelve jurors put their heads together and decide the matter.

(b) One strength of the jury system is the belief that a collective group of individuals will remember most, if not all of the facts, and come to a better decision than one individual in the same situation.

(c) A perceived weakness in the jury system is that jurors may be biased or prejudiced towards one side or the other.

(d) It is said that some jurors have their minds made up by the time opening statements are completed and it is difficult if not impossible to change their predisposition, biases, prejudices and beliefs. Therefore, the jury may or may not make their decision based solely on the evidence.

(e) Alternatively, the Judge may be asked to render the verdict. Trial before the Judge is generally quicker and may not be quite so technical since a trial by jury requires the judge to strictly enforce the Rules of Evidence and Procedure. A jury trial is also more formal.

(f) Either party may request a jury trial upon paying a jury fee to the Court within the required number of days before the trial.

(g) Trial before the judge allows the Court greater discretion in resolving the dispute; however, a Judge may be more or less prone to bias and prejudice than a jury.

6. Demand Letter. We frequently attempt to resolve disputes by first sending a demand letter to the opposing party.

(a) We set forth our representation, the facts that gave rise to the claim, the law or basis of the claim, a brief description of damages incurred and then make a demand to resolve the claim. Thereafter, a time deadline is given for the recipient to respond to the letter.

(b) Some causes of action and statutes that give rise to a cause of action require a demand letter as a prerequisite to filing a suit. The purpose behind this is to afford the opposing party an opportunity to resolve the matter without the expense of litigation.

(c) If the dispute cannot be resolved after the deadline imposed in the demand letter, the Client has to either continue negotiating, which may be futile, drop the dispute, or proceed with litigation.

7. Filing the Lawsuit or Alternative Dispute Resolution. A lawsuit is commenced by filing a Petition either in the Court or the appropriate forum for alternate dispute resolution.

(a) Alternate dispute resolution may vary depending on the type chosen and the ground rules established by the deciding body.

(b) Alternate dispute resolution frequently consist of the following:

(i) the agreement by the parties to have the matter resolved by alternate dispute resolution submitting forth required short statements of the positions;

(ii) selecting the arbitrator or panel;

(iii) obtaining and reviewing the rules that will be used by the arbitrator or panel to make the decision;

(iv) preparation of the case, with or without depositions or formal discovery process;

(v) scheduling a date for hearing the dispute;

(vi) hearing the dispute;

(vii) the decision and notification of all parties by the deciding board.

(c) A lawsuit in state or federal court is frequently handled per the following process.

(i) First, we must choose the appropriate Court, state or federal, and the appropriate court in the state or federal system.

(ii) Thereafter, a Petition is prepared. The Petition sets forth the following:

(a) jurisdictional requirements, the venue or location where the suit should be handled;

(b) the party designation and information for service of process;

(c) the facts that gave rise to the controversy;

(d) the cause of action or claim;

(e) the damages or relief requested;

(f) a request for reimbursement of attorney's fees, if the same is allowed by the cause of action or statute;

(g) statutory prerequisites to the lawsuit; and then,

(h) a prayer for relief.

(d) Thereafter, a filing fee is paid the Court for filing the lawsuit.

8. Service. The next step is to obtain service of the lawsuit on the Defendant(s).

(a) This is frequently done by having a Constable physically deliver a copy of the lawsuit and summons in person to the Defendant.

(b) If the Constable cannot locate the Defendant, it may be possible to have an alternate service performed whereby the Petition is left with a person who is sixteen years of age or older at the Defendant's resident or at the Defendant's place of business.

(c) There are other methods for service in addition to above and the same can be discussed with you if the need arises.

(d) The important thing to remember and consider is that unless the Defendant can be served with the lawsuit the case cannot proceed since due process of law requires a party to be served in most instances before judicial relief can be granted.

9. Defendant's Response. Once the Defendant is served, the Defendant must answer the lawsuit.

(a) In state court, the Defendant has twenty (20) days from the next Monday after service in order to enter his appearance.

(b) This is frequently done by having his attorney file a Defendant's Original Answer with the Court.

(c) A written Answer may be specific or general.

(d) In most instances a general denial is filed.

(i) A general denial states that the Defendant denies the claims made by the Plaintiff and requests proof of Plaintiff's claims.

(e) The Defendant may also assert claims that he or she has against the Plaintiff by filing a counter-claim or, if more than one Defendant is involved, by filing a cross-claim against the other Defendants.

(f) If a Plaintiff sues a Defendant, the Defendant may have an even better claim against the Plaintiff and therefore the counter-claim can be stronger and worth more money than the Plaintiff's claim.

(g) Therefore, the parties are always advised to consider the possibility of counter or cross claims before commencing the litigation process.

(h) If the Defendant objects to the place where the lawsuit is filed, and desires to have the same transferred to another county, he may file a Motion to Transfer Venue or file a Petition for Removal to transfer the case from state to federal court.

(i) There are separate rules regarding the determination of venue and they will be discussed at a later time if the need arises.

(j) The party contesting the venue must file a written contest to the same and a hearing is generally required before the Court can resolve the venue dispute.

(k) Thereafter, if the motion is granted, the case may be transferred to another county or Court.

(l) In addition to a Motion to Transfer Venue, other pretrial pleas can be heard which including but are not limited to a Motion to Dismiss (for lack of jurisdiction), a Motion to Abate (to cancel, postpone, or delay the lawsuit), special exceptions or the pleadings, etc.

10. Discovery. The next phase of the lawsuit is called the discovery stage.

(a) Before the dispute can be resolved, the facts that support your case and the facts that the other party will attempt to rely on to support their defense or position must be uncovered.

(b) Frequent actions in the discovery process include but are not limited to the following:

(1) Request for Production of Documents. This is used when one party requests physical evidence and documents that the other party has in order to review and find out as much as possible about the case.

(2) Interrogatories. These are written questions whereby one party asks the other party specific questions regarding the facts or law.

In State Court, written questions are limited to two sets of thirty (30) questions each unless one obtains the Court's permission to expand on the scope of the same.

Written answers must be sent to opposing counsel within thirty (30) days or else sanctions may be obtained against the non-answering party including but not limited to assessment of attorney's fees and penalties against the attorney and the party that refuses to answer the Interrogatories.

(3) Request for Admissions. Either party may send a formal written request which requires the opposing party to admit the truth of said requests or deny the truth of said requests.

Request for Admissions are designed to identify and establish facts that are uncontested and thereby narrow the scope of the fact finding process.

After Request for Admissions have been submitted to the other side, the party receiving the requests must file a written answer admitting or denying the requests within thirty (30) days from the date that the party has received the same or else they may be deemed admitted against the party and said facts may be conclusively established against that party for failure to respond.

(4) Depositions. A deposition can be taken orally or by written questions.

The purpose of a deposition is to confront a potential witness to the case with specific questions and obtain his answers to be taken down by a court reporter.

Depositions may be taken in person, by telephone, or videotape. In either case, the answers are written and transcribed by a Court Reporter.

Most discovery is obtained by the use of depositions; however, depositions are expensive since the Court Reporter is paid a fee per person to receive a fee for their testimony and the attorneys charge for their time involved in taking the depositions.

Due to the cost involved, you may not be able to afford to take the depositions of the potential witnesses in the case.

On the other hand, failure to take a deposition may leave a party surprised at the time of trial because a witness may be harmful to your case. The better practice is to take the depositions of all of the potential witnesses unless the cost is prohibitive and you are prepared to face the consequences of unexpected and/or damaging testimony.

(5) Examinations. When physical objects are the subject of dispute, a motion may be filed to inspect or physically view the property. In personal or medical cases, a request may be made to have an independent medical exam.

11. Sanctions. Sanctions may be imposed on a party who refuses to timely comply with the discovery process. For instance, if you fail to provide your attorney with answers necessary to produce documents, answer Interrogatories, answer Requests for Admissions or fail to appear for your deposition, or produce required items, the Court may impose sanctions for your failure to comply with the Texas Rules of Civil Procedure. Sanctions include, but are not limited to:

(a) striking the party's pleadings or Answer, which therefore renders the party defenseless so that a judgment or other relief may be obtained against the non-complying party;

(b) imposition of an award of attorneys fees to the other side to punish the offender; and, in some cases,

(c) contempt of Court.

12. Case Evaluation. Once the discovery is completed, the parties then prepare for trial.

(a) Now is an essential time to complete the legal research in the case, if it hasn't been done. It is imperative to research the statutes and case law to determine merits of the case. If under the fact scenario most favorable to you, the legal issue is not favorable to your side, you should quickly resolve your claim or dismiss the case. If on the other hand case law is on your side, then it makes more sense to proceed forward. Legal research is both time consuming and expensive. Computer-based legal research should also be considered; however it can be quite costly.

(b) Settlement negotiations should be considered throughout the entire process, but especially after discovery has been finalized.

(c) Upon completion of the discovery, the parties should be able to review the expected testimony of the witnesses, with the applicable case law and make predictions as to expected decisions of the court.

(d) The positive and negative aspects of each case need to be evaluated in order to determine the likelihood of prevailing at trial and/or the damages that may be lost if a decision is adverse to the client.

(e) Many parties frequently resolve litigation using the legal economics theory. Which is, that notwithstanding the merits of the case, the cost of litigation and the time involved may dictate a settlement rather than proceeding to trial.

(1) For instance, a Defendant may decide to pay a sum of money that is somewhat related to the cost to defend the case even though the defendant believes that he or she will ultimately prevail at trial.

(2) The benefit of offering a nuisance settlement or a settlement dictated by legal economics assures the defendant that the case is over and a release obtained for payment of the moneys that may otherwise have been spent defending the case at trial.

(3) The advantage to such a settlement is that even though the Defendant may believe that he or she has done nothing wrong, and is in the right, after spending the moneys to defend its position, Plaintiff may possibly prevail, in which case the Defendant not only must pay the moneys awarded to the Plaintiff, but also pay both parties' attorneys' fees.

(4) Likewise, the Plaintiff may desire to settle even though the Plaintiff believes that he or she has a meritorious case, however, the uncertainty of trial, unpredictability of the court's or the jury's decision, the cost of going to trial, expert witness fees, and time away from work all add up to more money that the Plaintiff is willing to gamble since Plaintiff has no guarantee of a favorable judgment or that it is collectable.

(f) The Plaintiff, generally, has the burden of proof which means that the Plaintiff must prove, in a civil case, that its position is correct by a preponderance of the evidence.

(1) The Plaintiff may feel that its witnesses may not be strong, credible or able to carry the burden, or Plaintiff may not be able to obtain documents or evidence that proves or supports its position, and after anticipating the total expense that may be necessary to take the case to trial, legal economics may dictate a settlement for much less than could be awarded at trial in order to resolve the dispute due to the cost of litigation.

13. Appeals. Both parties must also consider the fact that once a decision is awarded, an appeal can be taken by either party and that may result in a change or reversal of the lower court's opinion, and of course, would delay final resolution of the matter.

14. Motion for Summary Judgment. After settlement has been considered, either party may file a Motion for Summary Judgment.

(a) A Motion for Summary Judgment should generally be granted if there are no material disputes of fact and, based on said facts the Judge can apply the law and therefore render a decision.

(1) For instance, in a commercial case, if a person has signed a promissory note, admitted that he signed the note and has no defenses to the same, a summary judgment could and should be filed in order to obtain a judgment against the Defendant.

(2) A party wishing to oppose a Motion for Summary Judgment must submit Controverting Affidavits and Amended Answers, if necessary, within the time period required by law (generally seven days before the hearing), and the opposing party must raise facts that would be admissible into evidence that give rise to contested issues that require a Judge or jury to hear both sides of the story and therefore decide the contested issue before a final decision can be made.

(b) If a Summary Judgment is either not granted or appropriate, the party should then prepare the case for trial. This could include meeting with all of the prospective witnesses, preparing them for trial, obtaining all of the evidence that could be submitted at trial and preparing exhibits, demonstrative aids, charts, summaries, etc. that make the case easier to understand by the Judge or jury.

15. Trial Settings. Thereafter, a trial setting is obtained.

(a) Courts' dockets vary.

(1) A docket is the setting and listing of cases that may be tried by the court during a given period.

(2) Once a case has been set for trial, depending on the court and location, a specific date may be given, or the attorney may be informed that the case is ready for trial and will be heard by the court when it is ready.

(3) This means that the attorney, and witnesses must be prepared at a moment's notice to be available to come to court and proceed with their trial. (This poses a real time problem for the clients', attorneys' and witness' schedules).

(4) In large counties, such as Harris County, this can be quite inconvenient and further justifies the need for depositions because without depositions if a court calls a case for trial and one of the witnesses is not available, the judge may or may not allow a continuance or a postponement of the trial. If the continuance is denied, the parties may have to proceed with the trial notwithstanding the unavailability of the witness.

(5) The way the docket is structured, however, can be very inconvenient for the parties and witnesses. Unfortunately, the heavy volume of cases precludes changes in the current system.

16. Pretrial Conferences. Prior to trial, many courts have a pretrial conference.

(a) More and more courts are using docket control orders and pre-trial orders.

(b) Docket control order sets forth a time table and deadlines for completing the various steps in the litigation previously discussed.

(c) A pretrial conference is generally a time where the attorneys meet with the judge, review the facts of the case and the discovery taken, and settlement possibilities. In federal courts, as well as some state courts, the case should be completely developed at the time of the pretrial conference, since you may be required to disclose names of witnesses, their expected testimony, and exhibits to be offered at trial.

17. Trial. Thereafter, the case may be called for trial.

(a) If the case is called for trial, the party needs to call his witnesses and have them come to the courthouse.

(b) The attorneys may meet briefly with the judge or opposing counsel and have last minute settlement discussions.

(c) Thereafter, the parties will select the jury.

(d) Once a jury is selected, the judge gives instructions to the jury, they are then sworn in and typically the plaintiff gives a short opening statement whereby he explains his case and what he expects to prove.

(e) Thereafter, the opposing side has the right to give its opening statement.

(f) Trial then begins with the Plaintiff submitting evidence to prove his position.

(g) The Plaintiff will generally call the first witness.

(1) The witness is asked questions by the attorney and then thereafter, the opposing attorney has right to cross-examine or ask his own questions of the witness.

(2) Proofs of facts are done by question and answer form.

(3) The attorney may not explain the evidence or the case to the judge or jury except in the short opening and closing arguments.

(4) In other words, a witness or attorney may not simply lecture or explain their case to the jury. It must be elicited in a question and answer form. The opposing side has the right to object to the questions and introduction of evidence.

(5) The rules of evidence are quite complicated and occasionally prohibit the introduction of key evidence that is essential to a party's case.

(h) After the plaintiff has called all of its witnesses, then the defendant is entitled to call its witnesses.

(i) After both parties have presented their cases in chief through their witnesses, introduced exhibits and evidence, the court generally lets the jury take a recess and then the attorneys prepare special questions that must be answered by the jury.

(j) Fact issues are determined by having the jury answer special questions. The answers are given to the judge who then applies the law to the answers in order to render a final decision.

(k) The drafting and preparing of the questions are crucial to the outcome of the case because how the questions are phrased may help one side or the other.

(l) The judge's ruling on which special questions are submitted to the jury can have a large effect on the jury's decision.

(m) Once the special questions and instructions to the jury have been prepared, both parties are entitled to give closing arguments.

(n) The plaintiff, or the party with the burden of proof, has the right to make the first closing argument to the jury.

(o) The opposing side, or defense, then has the right to offer his closing statement.

(p) Then the plaintiff has a short rebuttal period in order to make its final closing statement to the jury.

(q) After the closing statements are made, the judge gives final instructions to the jury and the jury then retires to the jury room to deliberate and make their decision.

(r) After the jury has made their decision, a verdict is announced and the answers to the special questions are given to the court.

18. Decision. If a required number of jurors do not answer the special questions appropriately, the case may have to be retried and the process repeated.

(a) Assuming, however, that the jury unanimously answered the special questions, or in some courts, ten out of twelve jurors, the answers are given to the judge and the judge is then able to render a final decision.

(b) In the event that some of the answers to the special questions are inconsistent with each other and with a final outcome, the court has to decide if the answers can be reconciled; if not, a new trial may be required.

(c) Assuming that the questions are consistent, and the judge can render a final decision, a written judgment is then prepared, submitted to the court for its approval, and then signed by the judge.

(d) After a judgment is obtained, the losing party has thirty days to contest the judgment; for instance, requesting a new trial if he believes that he can show that errors were committed in the trial or appealing the judgment to a higher court.

(e) If a Motion for New Trial is denied, the party must then appeal within the time deadlines.

(f) The appeal process can be time consuming and expensive.

19. Conclusion. As you can see, based on this lengthy letter, the litigation process is complicated and can be quite expensive. We cannot guarantee any predetermined outcome due to the risks and unpredictable factors associated with litigation.

Please carefully review this letter and if you have any questions, call me. Thereafter, please sign the letter in the space provided, keep one copy for yourself, and send the original to my office.

I hope this letter has been useful to you.

Very truly yours

[Attorney's Name]

CLIENT ACKNOWLEDGMENT AND DECISION

I have read and understand the above summary of the litigation process. I fully understand that litigation is risky and not generally capable of exact determination. Based on the above, and after discussions with my attorney, I have decided that I desire to:

Check the desired option

1. Settle the case based on the demand letter without filing a lawsuit and going to trial.

2. File a Lawsuit and attempt to settle the case for $_____.

3. After the lawsuit has been filed and if the matter cannot be settled for the above sum, then:.

(a) If a lawsuit is filed, I hope to settle the same and am not willing to go to final trial on this matter I do not wish to spend extensive moneys for discovery and litigation preparation. Accordingly, I wish either to settle the case for a reasonable amount or dismiss the litigation.

(b) I understand the risks and rewards of litigation and desire to settle the case for $ or take my chances at trial.

Date _____

PREVIEW

[Client Name]

PLEASE DO NOT COPY

THIS DOCUMENT

THANK YOU