

"THIS IS A LAWSUIT WAITING TO HAPPEN: PRE-LITIGATION TIPS"

by Rachel Fielding

Most of the time, our clients turn a blind eye to the possibility of a lawsuit. Clients will bury their heads in the sand until the fateful moment when the lawsuit becomes an actuality and can no longer be ignored. Despite your best efforts, you might not be able to avoid a lawsuit. While it is often advisable to attempt to resolve matters, you need to be prepared if the matter proceeds to litigation. Below are some helpful pre-litigation tips which might literally win your case!

1. **Avoid Unnecessary Verbal Contact on the Dispute** The problem with verbal communication, is that when it is time for trial, there is no proof as to what happened, other than your recount of the incident. This usually conflicts with the other party's account and the Court has to make a decision, based on credibility, as to who should be believed. Try to limit important communications with the other person to written communications.

Sometimes it is impossible to avoid all verbal communication with this person. You should maintain contemporaneous notes at the time of the conversation. This will serve to remind you as to when and what took place when you are at trial, which could be several years after the fact. The notes should be dated and written in a clear and unbiased manner. Notes which are obviously a biased account of events will be given a lot less weight by the Courts as opposed to clear factual based accounts. One tip I always tell my clients, is to send an email detailing the conversation directly to the other party after it happens. It serves as your written and dated record as to what happened, and it also gives the other party a chance to respond and correct your recounting of the conversation.

2. **Avoid Unnecessary Communications about the Dispute** Ontario has broad discovery rules. In litigation, all parties must produce every document in their possession relevant to the issues. This means that all communications such as documents, notes and emails relevant to the issues, that are not protected by privilege, will be produced to the other side. It therefore serves to be mindful of that obligation by being careful of what documents you create prior to the dispute. You also want to be careful about what you put in your communications. This means be careful of your tone and language. It will not help your case if the other side's lawyer pulls out an email in which you, for example, you used inappropriate language. A good thing to keep in mind is, how would you feel if a judge or jury read this text or email.
3. **Preserve Evidence** It is important to remember to preserve evidence. You do not know how many times a client has told me, "Oops, we did not keep a copy" or my all-time favourite, "The text messages were on my old phone and I have a new one now." If you are switching phones, screenshot the relevant text messages and save them somewhere. Make sure that you keep a copy of



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all documents, texts or notes in a safe place. Keeping everything together will also save you a lot of time and effort down the road, when your lawyer asks you for a copy of all documents related to the dispute.

4. **Do Not Admit to Anything** Sometimes the initial reaction in a dispute is for one person to say "I am sorry" or "We will try and fix this." While the sentiment is positive, you may not realize that this statement could hurt you later on in the case. Admissions of liability or potential admissions of liability provide wonderful ammunition for the other sides' lawyer during litigation. Always check with your lawyer prior to sending such communications.
5. **Contact Your Lawyer** It is best to contact your lawyer as soon as possible. Your lawyer can assist you in reading through any potential communications with the other side, so that you do not inadvertently say or admit something that might later be used against you. It is never too soon to strategize and plan, and your lawyer might be able to assist in coming up with a resolution which can avoid costly litigation.

Conclusion

If a matter is going to end up in litigation, the best thing you can do is prepare for it. Pretending otherwise will not make it go away, and can cause serious problems for you down the road if you are not careful. Cases can be won, or lost, before they even start.