

Draft
(12/16/11)

ATTORNEY WRITES

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“To Litigate or not to Litigate, that is the Question ...”

If possible, litigation should be avoided. That, from a lawyer. Unfortunately, litigation is typically expensive, time-consuming, frustrating, and unpredictable. In the overwhelming majority of situations, it is better to work out controversies regarding riparian, lake, river, and stream matters informally (or less formally) through mediation or arbitration. Litigation should be a last resort.

Unfortunately, riparian controversies and related controversies sometimes do end up in court. If you are considering filing a lawsuit, you should weigh the proverbial “pros” and “cons” of litigation. First, litigation is almost always expensive. Many people are shocked when they hear from friends about the actual attorney fees, court costs, and other expenses incurred in litigation. In Michigan, attorney fees for real estate, riparian, and litigation attorneys can range from a low of approximately \$150 per hour (which tends to be younger, less experienced attorneys) to a high of \$300 per hour, \$400 per hour, or even more for highly experienced and renowned attorneys. On average, experienced riparian and litigation attorneys in Michigan normally charge in the range of \$225 to \$350 per hour.

Anyone involved in litigation regarding riparian, water resources, or related matters in Michigan should know up front that Michigan subscribes to the American system of attorney fees. That is, in the overwhelming majority of cases, win, lose, or draw, each party normally bears its own attorney fees, without reimbursement by the losing party. Most other industrialized

nations in the world have adopted the English system of attorney fees, where the loser in litigation normally reimburses the prevailing party for its attorney fees (and in addition, the loser must also pay its own attorney fees). On relatively rare occasions, a prevailing party can recover certain attorney fees from the other side if the other side's claims, defenses, or tactics are deemed frivolous by the court, but that does not happen very often. Also, pursuant to certain mediation and offer of judgment court rule provisions, limited attorney fees reimbursement from the other side can sometimes be obtained, but again, that is not always the case. The prevailing litigation party in Michigan is sometimes entitled to certain "court costs" from the losing party, but those court costs do not include attorney fees and normally involve a relatively narrow segment of costs (for example, court filing fees, certain miscellaneous fees, and in some cases, deposition fees).

Litigation involving riparian, water law, or general real estate matters can often cause a party to incur \$30,000, \$40,000, \$50,000, or even more in attorney fees and costs should a matter proceed through trial, which does not include any damages award that might occur in certain cases. Attorney fees and costs for any appeals are in addition to those trial court expenses.

Another matter that should be pondered prior to commencing litigation is obvious, but is often overlooked by litigants: the human factor. Although relations between two adverse parties may be strained or even outwardly hostile prior to litigation, litigation will frequently permanently destroy friendships and potentially create permanently hostile relationships. In most cases, litigation is the "nuclear option."

In addition, litigation is almost always unpredictable. For many litigation attorneys in Michigan, it seems that the outcome of court cases has become even more unpredictable over the past few decades. Many lay people have a mistaken belief that the law is clear, cut and dried,

and that courts normally make very decisive decisions, where one party wins and the other party loses. The reality in litigation is often more murky. Some judges will put great pressure on parties to settle, even up to the eve of trial and sometimes even after a trial has actually begun! It is difficult for any judge (no matter how conscientious and learned) to know all areas of Michigan law. Many judges are not well-versed in riparian or water law. The chances of a trial court judge making a major error in a trial involving riparian or water law issues is sometimes higher than would be the case with more common legal issues. Sometimes, the decision of a trial court is very unsatisfying for both parties, and more than one judge in Michigan has tried to “cut the baby in half” à la Solomon. More often than not, that simply leaves both parties to the lawsuit seething, particularly given how much time, emotion, and money both sides have invested in the lawsuit.

Typically, from the time the lawsuit is filed, it takes anywhere between eight months and two years for a case to move to trial and for the trial court to decide the case. An appeal to the Michigan Court of Appeals will normally remain pending anywhere between six months to two years. Should the Michigan Supreme Court decide to take a further appeal of the case, a case can be pending before the Michigan Supreme Court for between several months and a year or even longer.

Litigation can also be an emotional rollercoaster. Many parties in Michigan have celebrated significant victories at the trial court level, only to be devastated when the Michigan Court of Appeals or Michigan Supreme Court later completely overturns the trial court’s decision and rules in favor of the other party.

There are many factors that can increase litigation costs (and the litigants’ frustration levels). Parties to a lawsuit generally have the right to engage in “discovery” if a circuit court

case is involved. The theory behind discovery is that if the litigants have the ability to elicit all relevant documents, facts, and testimony from the other side before trial, it will lead to more concise trials, all relevant information will come out well in advance of trial, and no one will be surprised at trial. In theory, discovery also helps prompt settlements. In practice, however, discovery often leads to longer trials, greater frustrations, and more expensive lawsuits. Pursuant to discovery, a party can subject the other side (or even third-party witnesses) to depositions (being questioned under oath), interrogatories (which require written responses under oath), and document requests (where documents must be disclosed), all of which can be overwhelming.

Parties to litigation are often dumbfounded when they reach the conclusion that the other party or witnesses appeared to have lied under oath, either in discovery or at trial. However, many seasoned litigators believe that few people actively or intentionally lie under oath. What appears to be a lie can sometimes be based on people's differing perceptions of reality, memories playing tricks on a person, or even someone actually convincing themselves that something occurred differently than the true reality.

The party filing a lawsuit is called the "plaintiff." The party who is being sued is called the "defendant." Of course, a defendant really has no choice regarding whether to initiate the litigation, as litigation has already occurred and the person or entity is involuntarily part of the litigation. However, once a lawsuit has been brought against a defendant, the defendant may have the right to file a "counterclaim" against the plaintiff who initiated the lawsuit, and seek money damages or other relief against the plaintiff.

In Michigan, there are two general trial courts for civil matters. District courts handle damages controversies up to \$25,000, as well as certain statutory proceedings such as landlord/tenant, land contract forfeitures, and small claims court cases. Michigan circuit courts

are the courts of general jurisdiction, and handle cases with damages claims over \$25,000, as well as most riparian, real estate, and water law civil controversies.

Two alternatives to litigation are mediation and arbitration. These are called “alternative dispute resolution” options. In most cases, mediation prior to litigation is optional. In some cases, however, if a contract is involved, the contract may require mediation or arbitration in lieu of litigation if there is an alleged breach of the contract. Mediation is not binding. Rather, mediation involves a “facilitator” who attempts to have the parties reach a voluntary agreement. Arbitration is a binding process whereby someone who is not a judge (although the arbitrator might be a retired judge) presides over a “mini-trial” and makes a binding decision, which is generally not appealable. In circuit court cases, most judges will order mediation after a lawsuit has been filed.

It is true that I have painted a rather bleak picture of litigation in Michigan. However, in some cases, there are no reasonable alternatives to litigation. Before initiating litigation, riparians should retain an attorney or attorneys with significant experience in riparian law and litigation. The riparian should carefully weigh all of the costs likely associated with litigation, as well as the chances of prevailing through court action.