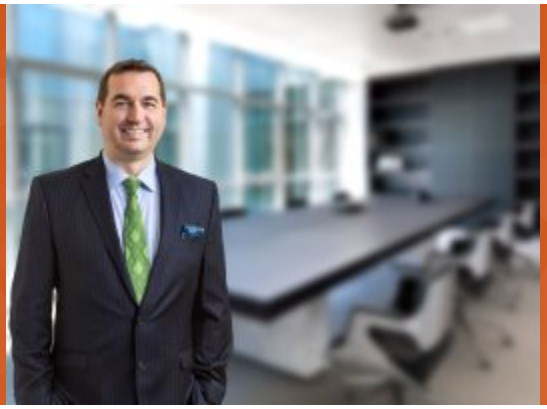
What to Expect When You're Expecting Litigation



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Part of the cost of doing business in any industry is the risk of getting involved in a lawsuit. Even though litigation is rarely an exciting experience for the parties involved, it is almost always an important one. Indeed, there's an old adage that describes litigators as similar to undertakers: clients always love when they—litigators or undertakers—do a good job, but never want to have to hire them again. It's only natural that a business—your business—would rather spend its time growing, selling, and servicing its clients and customers than engaged in a legal battle. Because most companies and individuals are not regularly engaged in litigation, it is useful to understand what the process is and what to expect if you are sued or if you need to bring a lawsuit against someone else.

The Complaint and Answer

The first formal step to initiating a lawsuit is the filing of a complaint. The complaint is a document that lists both the factual and legal allegations you are making against the defendant. If you are the defendant and you receive a complaint that was filed with the Court, do not ignore it because there are important deadlines you do not want to miss. Your lawyer will be able to make sure you take the necessary steps to respond to the complaint. The two most common responses are either to ask the court to dismiss the case or to file an answer that generally denies the important allegations of the complaint on a point-by-point basis.

Moving to Dismiss the Case

Most litigators can identify numerous instances in which clients who are sued say some version of, "the other side is completely wrong, can't the judge just throw out the case?" The answer is often, "no," even if the client is absolutely certain that the claims in the lawsuit are meritless. So long as a plaintiff alleges sufficient facts that, if proven true, would show that it is entitled to prevail in the lawsuit, the judge will not dismiss the case. It might be the case that the allegations are wrong or that later testimony or documents prevent the plaintiff from showing they are entitled to recover damages, but discovering that evidence takes time. In those cases, the court will allow the case to proceed to discovery.

Discovery Process

After the court refuses to dismiss a case at the beginning and the parties have filed their answers to the complaint, the next step is the discovery process. The discovery process is the time when you can learn facts about your opponent's legal and factual claims and defenses, and your opponent can learn about yours. It is purposefully designed to provide transparency to all parties so that if the case ever reaches a trial, no one is ambushed with new information they could have obtained earlier. In some courts, any party to the lawsuit can start this process immediately, even without waiting for motions to dismiss or answers to be filed. That is the default rule in Massachusetts state court. In other courts, including the federal courts, absent special circumstances and approval of the judge, the parties need to wait for the judge to set a schedule for when discovery commences. Depending on the complexity of the case, it is not uncommon

for discovery to last 6 to 9 months, or more. It is fair to say that discovery is often the most expensive and time-consuming part of the case.

There are several discovery tools that the parties can use to learn about the strengths and weaknesses of other side's case. The most common types of discovery are document requests, interrogatories, and depositions. Document requests are precisely what they sound like. A plaintiff can formally request categories of documents from a defendant that the defendant must produce, and vice versa. The proliferation of the use of email in the last two decades in particular has increased the quantity of documents that must be analyzed to determine if they are relevant and whether they are attorney-client privileged and therefore protected from production to the other side. You should be prepared for this to be a time-consuming process for your lawyers. Interrogatories are written questions that need to be answered under oath and in writing by the opposing party. Finally, depositions are oral testimony, done under oath, in response to questions by opposing counsel that is transcribed verbatim for later use. Depositions can also be videotaped in addition to being reduced to a written transcript of questions and answers. If you ever need to be deposed, you should expect that you will need at least a day shortly before the deposition to prepare for your testimony. The deposition will occur in a conference room at a lawyer's office, and sometimes feels less formal than testifying in court, but it is no less serious. Depositions can last a full day, and in some cases, even longer.

A plaintiff or defendant can also seek documents or deposition testimony from people or entities who have relevant information about the claims and defenses in the case, even if those people or entities are not formally parties to the case. To seek that information, a party needs to serve subpoenas unless the non-party is willing to participate voluntarily.

Summary Judgment

After discovery is complete, any of the parties have the opportunity to move for summary judgment. Summary judgment is a step before a full-blown trial that allows the judge to decide some or all of the claims in the case if there are no important facts in dispute. If there are disputed facts that affect the outcome of the legal issues, then the judge cannot decide those legal or factual issues through a summary judgment motion, and the case must go to trial to resolve the disputed facts. For example, take a hypothetical case where someone gets into a car accident and the plaintiff claims the defendant ran a red light. Imagine that in this hypothetical, if the light was green, the defendant wins. If all the witnesses say the light was green, then the judge can grant summary judgment in favor of the defendant with no need for a trial. If some witnesses testified at deposition or in an affidavit that the light was red and some that the light was green, then the case needs to go to trial to resolve the factual dispute about the color of the traffic light. For a party to show that there are (or are not) material facts in dispute, they will typically rely on the documents produced, answers to interrogatories, deposition testimony, and any other admissions by the parties in their filings.

Trial

Only a small percentage of cases ever actually go to trial. For example, in federal courts in 2017 and 2018, only 0.9% of civil cases were decided at or after a trial[1]. If you are involved in a case that goes to trial, however, you should expect that it will be an intense period of work for your lawyers, and your chance of success will be aided greatly by the preparation and attention your witnesses put into preparing for their testimony. Whether the trial is conducted in front of a jury or in front of a judge, you should not expect any surprise "aha!" moments like you might in Perry Mason or Law & Order. The rigorous discovery process that you went through means that the trial will be an exercise in methodically presenting the facts—witness testimony, documents, physical evidence—in a way that is as persuasive as possible. After all of the evidence has been presented, lawyers for both sides will get to make their closing arguments and explain why the judge or jury should decide the case in their client's favor.

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One of the most common reactions from first time litigants who go through this process, either because they were sued or needed to sue someone else, is that it takes much longer than they expected. This is not a surprising reaction, particularly for businesses that are accustomed to getting deals done and sales made on a tight time frame. As noted, less than 1% of civil cases generally get through all of the steps above and get resolved at trial. Throughout the process parties can always seek to settle their dispute, and many do. But if you do need to go through the process, it is good to know what to expect.

For more information, please contact Scott Magee.

Footnote:

1. *https://www.uscourts.gov/sites/default/files/data_tables/jff_4.10_0930.2018.pdf*