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PREPARING FOR CIVIL LITIGATION

So, you've decided to move ahead in litigation. By now, you should be aware that it can be a lengthy, time-consuming, and sometimes expensive undertaking.

WHAT WILL IT COST?

The cost of litigation is very difficult to estimate before the suit has been filed. The cost breaks down broadly into two categories: **Attorney Fees** and **Costs**. Your attorney will discuss the anticipated Fees and Costs associated with your matter.

Fees are the expense incurred for the effort an attorney expends on behalf of the client. Fees cover services like drafting documents, appearing in court, and meetings. Methods for calculating fees are described in more detail in the *Billing Policies and Procedures* brochure. *Costs* are payments the attorney must make on the client's behalf and for which reimbursement is expected. These include court filing fees; express or postage fees; experts and court reporters; charges for travel, mileage, or other indirect and out-of-the-ordinary expenses; and other costs directly related to the client's case.

While overall cost varies widely, a District Court case may sometimes be handled for as little as $1,200-$1,500. A Superior Court case can easily run $3,000-$5,000, and higher if extensive discovery is required; a Superior Court case costing $12,000-$15,000 is not at all unusual. A complex federal case can run into many tens of thousands of dollars.

HOW LONG WILL IT TAKE?

How long a lawsuit takes will vary with the complexity of the dispute, how hard the opposing party chooses to fight (and, to some extent, the approach taken by opposing counsel), and local rules that vary from county to county. Some counties follow a structured schedule in pursuing a case, striving to wrap up cases within a year; other counties leave the attorneys to work out scheduling and timing, and will only check in on the case if things seem to be running exceptionally long. Federal litigation is pretty uniformly constrained based on the type of matter. Federal cases typically run 12-18 months for relatively straightforward matters. State cases in Superior Court typically run 6-18 months if they go through to trial; if settled, they will often settle in under 6 months. State cases in District Court are often resolved in a month or two. There is a general consensus that fewer than 10% of cases go all the way to trial.

THE PROCESS

The flow of litigation is fairly predictable. It begins with pleading the case, after which the opposing party responds, usually denying most or all claims. It then moves to discovery, which is the structured exchange of information to uncover the facts of the matter. Then, the attorneys will usually go through a series of motions to get the court to examine the critical facts and decide if the case should move forward, and to resolve questions about issues such as confidentiality. If the case has not been rejected by the

court at this point, it is then typically referred for an attempt at informal resolution (see *Alternative Dispute Resolution* below) before being calendared for trial.

DEMAND

In some cases, but not all, an attorney will send a demand to the opposing party, to point out the problem as the potential plaintiff sees it, and to propose a resolution through which the potential defendant can resolve the matter without litigation, by paying damages, taking a requested action, or stopping a certain action or behavior. In truth, this only resolves the situation in the most clear-cut of situations, but it may lead to an informal resolution if the difference of opinion is not too stark. If the parties cannot resolve the dispute through a demand and settlement, the plaintiff pleads his or her case to the court. The demand phase rarely takes more than a couple of weeks; if it can't be resolved in a couple of weeks, it will very likely move to litigation.

PLEADING

Pleading is the process of setting out the formal claims by the plaintiff, providing enough information to show that the claim is in earnest, and to make it clear what the basis for the complaints are. The *Complaint* is the first formal document filed with the court, and it is *served* on the opposing party, together with a *Summons*, which gives the party notice that they are being sued, and how they need to formally respond to keep the court from granting a default judgment against them.

The opposing party's first formal response is an *Answer*. It is filed with the court and served on the plaintiff. It is often accompanied by a denial asking the court to dismiss the case, and stating why the defendant believes the lawsuit should not proceed. It may include *Counterclaims*. These responses, in addition to the Answer, may include a *Motion to Dismiss*, a *Motion for Judgment on the Pleadings*, or both. Defenses may be raised, such as claiming it's in the wrong court, that it should be in arbitration instead, or that there's a technical reason why the case should not proceed.

If either party believes their case is so clear-cut as to be obvious, these motions will typically be heard at the outset. The case will then be dismissed, may need to be amended, or may move on to discovery. This is the first stage where a judge *may* become involved. *If there are no motions to be heard in the pleading phase, it will typically take 30-60 days. Motions will typically extend that by another 15-30 days; the case may be 3-4 months in at this point.*

DISCOVERY

Discovery is the process of providing and requesting information between the parties. Part of the modern court system's ability to resolve disputes without trials is based on the idea that discovery of the truth will lead to a resolution before trial.

In federal court in particular, parties are required to provide certain information up-front. The attorneys then meet and establish a schedule for exchanging documents, requesting statements, and deposing witnesses. Most of this is scheduled at the convenience of the parties, and without intervention from the court. Discovery includes several tools for finding the information necessary to uncover the truth and resolve the dispute. These include, but are not limited to:

- **Interrogatories** – Interrogatories are questions about the facts of the case, and they must be answered under oath by the party receiving them. Depending on the court, they may be limited in number. They can ask for things like medical background, education, the names of people who have information, the identity of known witnesses, or a description of events. They are generally narrow, specific questions.
- **Requests for Production** – Requests for Production are essentially lists of things the lawyers want to see, such as contracts, handbooks, manuals, correspondence, receipts, tools, weapons, photographs, or any other "tangible" things.
- **Requests for Admission** – Requests for Admission are specially constructed statements that seek to establish specific, "atomic" facts. The party receiving them must admit that they are true, or state that they are false. They may seek to clarify the claims made in the Complaint or defenses, or simply to establish facts necessary to win or defeat the claims in the case. If unanswered, they are assumed to be true.
- **Depositions** – Depositions are interviews under oath. They are transcribed by a court reporter, and may also be videotaped. Depositions are often the most expensive part of discovery, because they require paying an outside service to prepare transcripts or videos. Depositions can run from $300 for brief interviews with each of several witnesses, or $1,200-$1,500 for a full-day interview with a key witness.

  Depositions are somewhat like a dry run of what will be heard at trial, allowing the attorneys to see how questions will be answered under oath, and how witnesses will behave or be perceived at trial. Depositions can, and often do, delve into issues and information that can't or won't be admitted at trial, but which may lead to important information that *is* admissible; they can get into very personal information if the issues in the case involve personal relationships, work history, or medical history.

Discovery will often span 2-6 months, depending on complexity and the volume of information, how long it takes to schedule and hold depositions, and whether either party resists the disclosure of information. The parties are usually free to overlap the beginning of discovery with the early pleading phase, though the first discovery responses will almost never be due fewer than 45 days from the filing of the Complaint. *Therefore, the close of discovery will generally be anywhere from 45 days after filing to 6-9 months from filing.*

MOTION PRACTICE

Once the attorneys have asked for all of the information needed to resolve the dispute (either by simply proving their case on paper, or by convincing a judge or jury based on the information they present), they will generally file *motions* to ask the court to make decisions, to resolve the dispute based on the law, or to schedule a trial. Motion practice can start as early as the defenses filed with the Answer and early Motions to Dismiss, and will run right up until just before trial, when the attorneys ask the court to set ground rules for including or excluding evidence, to qualify witnesses, or to seal information. Some motions may even interrupt a trial briefly.

ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND ARBITRATION

Depending on the rules of court, the parties may be ordered at some point into mediation or arbitration. Both of these are efforts at informal resolution involving an impartial third party, and they are collectively referred to as *Alternative Dispute Resolution*, or *ADR*. They are based on the premise that involving a knowledgeable third party who has no vested interest in the outcome will allow both parties to test the strength of their cases, and possibly arrive at a compromise resolution. The parties generally must pay for the cost of the mediator or arbitrator, in addition to paying their respective attorneys to be there to argue and represent them.

- **Mediation** – Mediation is an informal attempt to reach a compromise. A mediator is often an expert in the field of the dispute – often an attorney who practices in the field – and so can offer the parties a realistic assessment of their claims and the reasonableness of their demands. A mediator has no say in the outcome, but simply serves as a messenger between the parties and a sounding board for their arguments and views of the case. The goal of mediation is a *settlement agreement*.
- **Arbitration** – Arbitration is a more formal attempt to decide the case. The arbitrator acts as a judge, and actually makes a decision in a sort of mini trial. The parties have a chance to make their case, present their evidence, and argue for a particular resolution. The arbitrator will make an *award*, and will usually explain how she or he arrived at that decision. This decision can often be appealed to a judge.

ADR is usually scheduled by an order of the court, typically at a time when the parties have a fairly good idea what the facts of the case are – typically near the end of discovery. (Sometimes, seeing the arguments presented by the other party in ADR will lead to another round of discovery, if it's allowed, so an unproductive session that doesn't resolve the case may add 30-60 days to discovery.) While ADR doesn't usually add to the length of the case, it does have a cost: Most mediators and arbitrators cost $300/hour or more, which is split between the parties. So, add 3-8 hours at $150-250 per hour to the cost of the attorney, and do the math. *ADR will generally not extend the timing of the case; it will be scheduled for a day within the process.*

TRIAL

After the close of discovery, and after any motion practice that may attempt to narrow the questions or even get the case tossed out before trial, there will typically be a quiet period of trial preparation lasting 1-2 months or more. The trial itself may take anywhere from 1-2 hours to a week or two, again, depending on the complexity of the dispute, the number of witnesses, the amount of evidence to be presented, etc. *Expect the pre-trial and trial period to extend 2-8 weeks beyond the close of discovery.*

APPEAL

If a party wins at trial, and the other party believes that the court misapplied the law or allowed (or disallowed) the admission of evidence that it shouldn't have, the losing party may appeal, which starts a whole new process that can take several months. In some cases, it may be necessary to suspend the underlying case while important questions are answered by a higher Court of Appeals, which can add weeks or months to the litigation of the underlying case.