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Entrepreneur's Introduction to Litigation

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Introduction

The words “lawsuit” and “trial” usually conjure images based upon either media coverage of recent, significant cases or trials depicted on television and in movies. A real lawsuit and trial are significantly different than what we see on television or in films. Media coverage of a trial does not delve into the reality of a lawsuit – the months and possibly years of pre-trial “discovery” and motion practice that occur before a case goes to trial.

This guide is aimed at removing some of the mystery behind a lawsuit and trial, and also at informing entrepreneurs what really happens prior to and during those trials you see on television. The sections in this guide cover the basics on a lawsuit, from filing of a “Complaint” through trial and, ultimately, the appeal process. This guide provides a complete picture of the litigation process to let entrepreneurs know what to expect as a potential party to a lawsuit.

There are other important considerations to litigation not addressed in this guide, such as insurance coverage, if any, and confidentiality agreements (known as protective orders) between the parties to a lawsuit. Additionally, a corporation usually cannot appear by one of its owners, but must be represented by counsel. Certainly, anyone who is sued or is thinking about suing another should consult with a lawyer as soon as possible. We hope this guide helps entrepreneurs develop a better understanding of the litigation process.

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Complaints and Answers

A. The Complaint

A lawsuit begins with the filing of a Complaint. The Complaint sets forth the facts supporting the plaintiff's legal claims against the defendant(s). The Complaint needs to contain certain items, such as the basis for the claim, the facts supporting the plaintiff's claim and facts sufficient to show that the plaintiff has the right to be in that court. For example, the federal courts have "limited" jurisdiction, meaning that the federal court can only hear matters which either arise under federal law or are between parties from different states and the monetary damages are significant.

B. Response to a Complaint

Once the defendant is served with the Complaint, she has a certain limited time to file a response with the court. The time to respond generally is based on when the plaintiff officially serves or delivers the Complaint to the defendant (note that there is a time frame for "removing" a case from state court to federal court that does not require "service" on the defendant, but is calculated based upon when the defendant first learns of the lawsuit.) The amount of time to respond to a Complaint varies by court, but is generally a short period of time such as 21 days for federal court.

What does a defendant file in response to a Complaint? Generally, a defendant "answers" the Complaint. Frequently, a defendant may ask the court to dismiss the case for some type of defect. Rarely, a defendant may ask the court to rule on the case as a matter of law based upon the Complaint and Answer. While a defendant can also choose to ignore a Complaint, this will inevitably lead to a "default judgment" against the defendant, which means the plaintiff has won the case and can collect on its judgment, assuming there is a monetary award.

In its Answer, the defendant must respond to each of the allegations in the Complaint, and must either admit, deny, or state that it does not have sufficient information to respond to the allegation, which acts as a denial of the plaintiff's allegation. Importantly, the Answer is where the defendant also sets forth its "affirmative defenses" as well as any claims it may have against the plaintiff. Affirmative defenses essentially state that even if the plaintiff's allegations are correct, the plaintiff cannot recover because of a defense held by the defendant. For instance, a defendant may defend against the plaintiff by stating that the plaintiff's claim was not timely filed, as there are statutory bars which prohibit filing a particular lawsuit after a period of time has elapsed.

Claims which the defendant has against the plaintiff are called "counterclaims." These claims are typically related to the plaintiff's lawsuit. For instance, if the plaintiff sues the defendant for failing to make payment under a contract, the defendant may defend and assert a counterclaim by alleging that plaintiff's performance under that contract was defective.

Typically, parties can amend the Complaint and Answer during the course of litigation, especially after they have had a chance to take discovery (see next topic) regarding the lawsuit. But, the time frame for amending is frequently limited by the Court. After the Complaint and Answer are filed and served, courts usually set up a schedule for the case, including time frames for taking discovery, filing certain motions, and for trial, if necessary.

Discovery

Discovery is a pre-trial phase of litigation during which a party to a lawsuit seeks to "discover" information from the opposing party. Discovery is meant to facilitate the truth-finding function of the courts and, as such, parties to a lawsuit have an automatic right to discovery. From a strategic standpoint, discovery is used to gather and preserve evidence in support or defense of the claims made in the complaint. Further, discovery often helps parties narrow the focus of the litigation in preparation for trial and, in some cases, may lead to a pre-trial settlement. Discovery is an important phase of litigation because the evidence gathered during discovery will often serve as the foundation of a motion for summary judgment and/or strategy at trial.

Discovery proceedings are typically governed by state statutes in state court and by the Federal Rules of Civil Procedure in federal court. Generally, the scope of discovery permitted under these rules is very broad. Discoverable information may include any material that is relevant and proportional to the needs of the case. However, certain information – including information protected by the attorney-client privilege and the work product of an opposing party – is generally protected from discovery. During the discovery period, parties may serve discovery requests upon one another. These discovery requests are made through one of several available discovery mechanisms including interrogatories, requests for admission, document requests, and depositions.

Interrogatories are written discovery requests often utilized to obtain basic information such as names and dates. Any party served with written interrogatories must answer the questions in writing and under oath. Similarly, requests for admission consist of written statements directed towards an opposing party for the purpose of having the opposing party "admit" or "deny" the statements. Often, these requests seek to establish undisputed facts, authenticate documents, and pin an opposing party to a particular position. Through document requests, a party may ask another party to produce (or make available for inspection) relevant and non-privileged documents (we will cover document production in greater detail in a subsequent post entitled "Document Production and E-Discovery.")

The lynchpin of discovery proceedings is the deposition. Depositions are used to obtain the out-of-court testimony of a witness with knowledge relevant to the litigation. They allow a party to discover any relevant information known to a witness and are often the only method of discovery available with regard to obtaining information from witnesses who are not parties to the litigation. During a deposition, the witness is questioned under oath and must answer the questions asked truthfully to the extent that the answer would not lead to the disclosure of privileged information. The rules governing depositions also allow for the deposition of an organization or corporation where a party is unable to identify the particular witness within the organization that may have knowledge of the information sought. In that instance, a party may identify the information sought and the organization will be required to designate a representative (or multiple representatives) to testify on its behalf.

A party served with a discovery request must respond to the request within the specified time period or object to the requested discovery and state reasons for its objection. If, for some reason, a party refuses to respond to a discovery request, the party serving the request may move the court to compel a response. It is within the court's power to compel a response to a discovery request and impose penalties on a non-compliant party.

Document Production

Document Production Generally

The details are in the documents. Most of the information and facts pertinent to the litigation will be contained in the parties' documents. The term "documents" includes electronic files, emails, notes, spreadsheets, power points, contracts, drawings, photos, videos, diagrams, and phonorecords, to name a few.

Once discovery begins, a party has a right to request non-privileged documents in another party's possession, custody, or control, and relevant to the litigation (Document Requests).

Generally, a party has a duty to produce documents that meet the five following requirements:

1. Responsive to one or more of the Document Requests
    - If it is not asked for, it does not need to be produced.
2. Relevant to the litigation at hand
    - If the dispute is only about transaction X, documents relating to transaction Y do not need to be produced. However, the standard for what is "relevant" is extremely broad and is actually considered to be anything that is "likely to lead to admissible evidence."
3. In the party's possession, custody, or control
    - Even if a party is aware of a responsive and relevant document, if the party does not have it, it does not have to produce it.
4. Non-privileged
    - If a document contains communications between the party and its attorney requesting or giving legal advice, the document is protected by the attorney-client privilege. Therefore, even if the document is both relevant and responsive, the document should not be produced.
5. Proportional to the needs of the case
    - In some cases, a Document Request might seek documents that are only marginally relevant to a tangential issue in the case. Especially if responding to that request would require significant time and money from a smaller company or an individual, the court may rule that the party need not respond to that request, or that its obligations pursuant to that request may be limited.

In some cases, a party may be required to produce documents that contain confidential, trade secret, or other proprietary information. In these instances, the parties usually agree to a "protective order," which prevents an adverse party from looking at another party's documents that contain confidential business information.

Most companies store their documents electronically on servers, computers, and in other forms of data storage. These “documents” must be produced along with a party’s physical, tangible, or “hard copy” documents. Once a company becomes aware of pending, imminent, or reasonably anticipated litigation, a business has a duty to prevent all documents, including electronic data, from being deleted. For example, if the company’s Outlook server automatically deletes emails more than six months old in its employees’ inboxes, this auto-delete feature must be disabled until the litigation is over.

Furthermore, electronic documentation may contain information not available in its “hard copy.” For instance, a party may be required to provide an electronic document in “native” form, which might contain metadata, hidden comments, prior versions, and tracked changes. Because electronic document production can be so voluminous, many times parties agree to use search protocols to alleviate a party’s burden to search through its electronic records. For instance, if Transaction X is relevant to the litigation, a search might be done in a party’s Outlook servers for all emails referencing Transaction X.

A party can be penalized for failing to comply with Document Requests or for failing to produce electronic information in the requested format. Therefore, a party must make its best effort to work with counsel and fulfill its duty to respond to Document Requests.

Motions for Summary Judgment

Summary judgment is a procedural device that allows for the resolution of a lawsuit without the need for trial. After a lawsuit has been filed, the parties can file motions for summary judgment, although in some jurisdictions there may be restrictions that regulate the timing for bringing these motions. Summary judgment motions ask the court to enter judgment without a trial because there is no genuine issue of material fact to be decided by a jury (*i.e.,* because the evidence is legally insufficient to support a verdict in the other party's favor).

The party moving for summary judgment has to show that there are no factual issues that need to be resolved in order for the court to render judgment in its favor. If the moving party meets this initial burden, the burden then shifts to the opposing party to show specific facts demonstrating otherwise. The parties are free to, and often must, file declarations or affidavits and other papers, including discovery documents such as admissions, responses to interrogatories, and deposition transcripts, in support of their positions.

In deciding a summary judgment motion, the court will review the pleadings and any declarations, affidavits, and other papers submitted by the parties. The court will only grant summary judgment if, based upon that review, it determines that there is no evidence that would justify a verdict for the party opposing the summary judgment motion. In making this determination, all inferences drawn from the evidence and ambiguities in the facts are resolved in favor of the party who opposes the motion. Although it may appear difficult to establish entitlement to summary judgment, it is not impossible.

Motions for summary judgment are routinely filed. The primary purpose is to eliminate trial where possible, or to at least reduce the number of issues to be resolved at trial. Preparing for and participating in trial are typically large expenses. Summary judgment offers a way to avoid those costs and eliminate the risk of trial.

Trial

A trial gives parties the opportunity to present their evidence and arguments before a judge, and sometimes a jury, for a determination of the disputed issues. In a trial with a jury, the judge makes legal rulings, which guide the presentation of evidence, while the jury makes the findings of the facts in the case. In a trial without a jury, the judge performs both of these roles.

Before a jury trial begins, the jury is selected from a larger panel of potential jurors. During the selection process the judge will address several questions to the panel and a number of jurors may be excused “for cause,” often due to their relationship to the parties or witnesses, or for past experiences that suggest they might be biased given the issues in the case. In some jurisdictions the judge will allow counsel for each party to question potential jurors in what is known as the “voir dire” procedure. After all questions have been asked, counsel for each party has the opportunity to strike, without providing a reason, a limited number of jurors from the jury panel.

After the jury is selected, the trial begins with the parties offering opening statements. Typically the opening statements set out the roadmap of the party’s case, providing a preview to the jury of who the party will call to testify and what evidence will be presented.

After the opening statement, the parties begin the presentation of their case-in-chief. Generally the plaintiff is the first to present its case. Witnesses are called to the witness stand and provide testimony in response to questioning through direct-examination. After the direct examination the opposing counsel has the opportunity to cross-examine the witness. Following this, the judge may allow re-direct and re-cross, but this round is limited to the issues raised in the previous line of questioning. During the questioning, the judge will rule on any objections concerning the propriety of questions or the admissibility of testimony under the rules of evidence. Often, before trial, the parties will ask the judge to rule on the admissibility of important pieces of testimony or evidence after to avoid having those questions arise during the trial.

After the parties have presented their case-in-chief, counsel for each party presents closing arguments to the jury. Often, due to scheduling constraints of witnesses, the testimony during the trial will not be presented in perfect logical or chronological order. During closing arguments, counsel will pull together all of the separate pieces of evidence and testimony from the witnesses and provide a coherent presentation of the party’s side of the dispute.

After closing arguments, if the trial is before a jury, the judge will provide lengthy instructions to the jury to guide it during its deliberations. These include standard instructions regarding the elements of the causes of action, the admissible evidence, and other legal standards that have been developed through statutes or other law. Often the case will involve non-standard legal issues as well. For these issues, counsel for the parties will submit proposed jury instructions and the judge will determine the final instructions presented to the jury. After receiving the instructions, the jury is sent to deliberate on the merits of the case and return a verdict.

While the trial is sometimes not the final stage in the litigation process, it is the stage providing the parties with the fullest opportunity to present their evidence and argument on the merits of the case. In fact, if a party appeals a trial decision, the appeal will be decided based solely on the evidence the parties introduced at the trial.

Appeal Process

An appeal allows a party to have a trial court decision reviewed by a higher court, but it is not a chance for the party to re-try its case. In fact, a common litigation maxim is: if you want to win on appeal, win at trial.

While in certain situations a party may appeal a ruling by the trial court while a case is pending, generally a party files an appeal after a final judgment has been entered in the case. As outlined in previous posts in this series, a final judgment is entered after a party wins at the motion to dismiss stage, summary judgment, or after trial. After a final judgment is entered, the party seeking to appeal faces strict time limits within which the party must file a notice of appeal. The rules governing appeal procedure vary depending on whether the case is in state or federal court. In state court, an appeal is filed with an appellate court with jurisdiction over the state trial court. In federal court the appeal is filed in the circuit court of appeals with jurisdiction over the federal district (trial) court.

Once the appeal process has begun, the non-prevailing party under the final judgment files the initial appeal brief and is known as the appellant. The other party, referred to as the appellee, then files a response brief. Depending on the procedure of the particular appellate court, the appellant may then have the opportunity to file a reply brief. In its appeal brief, an appellant sets out the legal issues or errors that it believes were made by the trial court.

The role of appellate courts is to review legal issues, meaning the application of legal rules to a set of facts. Except in rare situations, appeals courts will not address issues of fact. A common example that illustrates the distinction: an appeals court will review whether the judge, under the rules of evidence, properly allowed certain testimony during the trial, but it will not review whether the witness' testimony was credible. The finder-of-fact at trial, meaning either the trial judge or jury, actually sees the live testimony and presentation of other evidence and is therefore best suited to assess the credibility of witnesses. Appellate courts typically give considerable deference to the factual determinations made by the judge or jury below and instead focus on the questions of law presented in the case. When a case is appealed from a decision granting summary judgment, the trial court below has determined that there are no genuine factual issues in dispute. In these instances, the appellate court frequently does not give deference to the trial court's decision.

An appeal may be decided solely on the written briefs submitted by the parties. Some appellate courts, especially supreme courts, also permit oral arguments by counsel. At oral argument each party presents legal arguments and responds to questions from the panel of appellate judges deciding the case. Although the legal issues are often extensively argued in the written briefs, appellate judges place great emphasis on oral argument because it gives the judges the opportunity to challenge those arguments and get clarification on key points. After the briefing and oral argument stage, the appellate court will issue a written decision which outlines the court's legal reasoning and, if necessary, directs further action to be taken in the case.

Generally speaking, parties in state or federal court have the right to an appeal before an intermediate appellate court. An appeal to a state supreme court or the U.S. Supreme Court, however, is only granted if that high court chooses to hear the case. Of all the potential appeals submitted to state supreme courts or the U.S. Supreme Court, only a very select few are typically granted. The appeals chosen by those high courts typically involve significant legal issues that implicate broader public concerns. Thus, while an appeal affords a party another opportunity for relief, the scope and likelihood of that relief is limited by the purpose and function of appellate courts.

Post-Trial and Execution on Judgment

After a verdict is returned in a trial, the party that loses may file various motions challenging the verdict. The losing party may, for example, move the court to reconsider its judgment, which generally is to allow the court to correct a manifest error or for the losing party to present newly discovered evidence. A losing party may also ask the court for a "judgment notwithstanding the verdict," which asks the court to admit the findings in the verdict, but find that judgment should be granted on different grounds than those decided by the jury. A party may also move the court for a new trial. A new trial can be requested for multiple reasons, such as an error that was made during the trial, the discovery of new evidence, or to correct an award of damages that is excessive or inadequate.

After exhausting all possible post-trial motions, the successful party (judgment creditor) will need to consider how to most efficiently and effectively collect a monetary judgment from the losing party (judgment debtor). Under most states' laws, a judgment creditor has numerous ways to attempt to collect the amount owed by the judgment debtor. In the event that a judgment creditor is unaware of the assets that a judgment debtor may own, the judgment creditor can conduct a supplemental examination of the judgment debtor. This proceeding provides the judgment creditor an opportunity to determine what assets that judgment debtor owns and may be available to satisfy the judgment.

Once the judgment creditor determines what assets the judgment debtor owns, the judgment creditor can begin to attempt to collect from the judgment debtor. For example, if the judgment debtor is employed or otherwise receives regular payments, the judgment creditor can garnish the payments being made to the judgment debtor. Further, if the judgment creditor owns any property, the judgment creditor can seek a writ of execution, which directs law enforcement to obtain possession of the property. Alternatively, the judgment creditor can file a new lawsuit against the judgment debtor asking the court to sell the property free and clear of all liens that may have attached to the property. In both of these situations, the property is sold and the proceeds will be used to pay off the amount owed to the judgment creditor and any parties with an interest in the property.

Prior to beginning to collect the amount owed from the judgment debtor, the judgment creditor should carefully consider the cost of each method and the likelihood of recovering the amount owed. All too often, a judgment creditor is faced with attempting to collect a debt from an insolvent judgment debtor, which simply costs the judgment creditor more money while recovering nothing from the judgment debtor.

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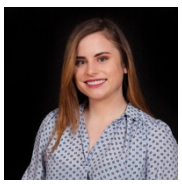

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Michael Best's areas of practice include: intellectual property; labor and employment relations (including employee benefits); litigation; corporate; government relations, political law and public policy; privacy and cybersecurity; real estate; regulatory; and tax.

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