

THOMSEN ♦ NYBECK
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What to Expect in Litigation

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What to Expect in Litigation

Litigation is never pleasant. Whether you started the case or someone has sued you, it can be a stressful and uneasy time until the case is over. The more you know about what to expect, the better you can control any anxiety and manage your expectations. Having the right lawyer also helps. Thomsen Nybeck has skilled attorneys ready to step in and bring a sense of order to any dispute, but in addition to our counsel, it may help you to know the following phases apply in almost any case.

What is going to happen?

Most cases ultimately settle, which can reduce the time spent in litigation, and most cases that don't settle can be completed within one year. More complex cases frequently take as long as two or three years to reach a trial. Each case is different and will proceed differently based upon a number of factors, but what follows are some of the significant milestones of litigation, excluding family law cases, which have their own set of rules.

- **Statutes of Limitations** apply to every case, and some cases involve agreements that further limit the amount of time a party has to assert a claim. If you believe you have a claim against someone, these limitations periods can be as little as one year or as much as six years or longer. Sometimes written notice of the problem must be given within a certain period of time. As soon as you believe you may have a claim, contact an attorney to save yourself the concern of having your claims expire.
- **The Summons and Complaint** must be served on the party being sued (meaning they must be personally delivered to them) to start a case in state court. After receiving a complaint, a responding party in state court has 20 days to provide its answer. In federal court the complaint must be filed to start the case, and the defendant has 30 days to respond after receiving the complaint.
- **Discovery** can take place for several months during the course of the case, but usually begins after the complaint and answer have been exchanged. This is typically completed six to nine months after the case begins.

There are several forms of written questions, which can include detailed questions about particular events or parts of the case (called **Interrogatories**), requests for documents or for access to physical evidence (called **Requests for Production**), and requests that a party admit certain facts (called **Requests for Admission**). These may be served by any party on any other party at virtually any time after a summons and complaint have been served. Responses to these written inquiries must be provided within 30 days from the date they are

received, with only rare exceptions. Consequences for failing to answer, or to do so in a timely and proper manner, can include having to pay the other party's costs or having the court determine that negative facts about your case may be presumed to exist when it's time to decide your case.

Depositions require another party or witness to appear and answer questions in person under oath; the questions and answers are recorded by a court reporter who prepares a written record of the deposition, called a "transcript." Depositions can be taken on "reasonable notice," which generally means not fewer than 10 days. Witnesses are rarely deposed before at least some written discovery has been answered.

- **Motions** usually are heard by the court nine to 12 months after the case has started, but can be brought much earlier depending upon the circumstances.

Motions are requests by parties that the court decide some issue prior to trial, and can range from a request that another party properly answer discovery to a request that the court dismiss the opposing party's claims. After each party files certain documents in support of a motion, the court normally has a **hearing**. A judge has the opportunity to hear the parties' attorneys speak about the issue and can ask questions to understand the parties' arguments.

The hearing on a motion usually will not occur fewer than 14 days after the party bringing the motion has announced its intent to have the matter decided. When the motion is one that has the potential to eliminate a party's case or particular claims, however, the hearing should occur at least 28 days after the motion is brought.

- **Settlement** discussions can happen any time. There is no rule about how or when to settle a case, and much of it depends upon a determination of the facts each party thinks it may be able to prove at trial. There are processes that parties sometimes use to help resolve cases before trial, including **mediation** (negotiation with the help of a third party) and **arbitration** (a shortened proceeding similar to a trial but decided by a person other than the judge). Mediation is the most common tool used to settle cases, and usually takes a day or less.
- **Trial** will occur if the court has not decided the case based upon a motion or if there has not been a settlement, at least 12 months after the case has commenced. This time may be longer if the case is more complex or involves a large number of parties. Trials involve several steps and usually range from two to five days, but can go much longer. Trials can be before juries or judges. The number of jurors can vary from six to 12, depending upon the type of case.
- **Appeals** are sometimes held if one of the parties disagrees with the result of a motion or trial and they believe the court made a mistake. In Minnesota, an appeal often takes approximately nine months to complete in each appellate

court. The first level of appeal in state court is to the Minnesota Court of Appeals. After that, a party may ask the Minnesota Supreme Court whether it will consider the appeal. Only very rare cases will be considered by the United States Supreme Court, which also decides whether to review a case or reject it.

What can I do about a potential lawsuit?

- Regardless which side of a case you're on, you must **preserve evidence**. If a party is sued or is aware that a lawsuit is likely, it has a responsibility to retain paper and electronic records (even e-mails, texts and instant messages). Delay any repairs, or at least advise other (potential) parties about scheduled repairs to allow observation of alleged defects or damage. This avoids later claims of evidence destruction. Courts have severely punished parties who destroy or conceal evidence, even if by accident (including automatic backups or purging full email accounts). Consequences include preventing the party from using related evidence and even granting judgment in favor of the other party. It may be necessary to involve an information technology professional to help preserve data.
- Direct employees to **cease communications to persons outside the company** about the dispute. Employees may have business or personal relationships with another party that causes them to feel sympathy or loyalty for that party. You should take immediate steps to prevent this sentiment from causing an employee to divulge information that may become central to the litigation, or which might undermine the attorney-client privilege.
- If you have been sued, consider all available insurance policies and **inform your insurer** (including, among others, commercial general liability, directors and officers, errors and omissions, auto liability, homeowners' or umbrella coverage providers) unless you are certain there is no coverage for the issue in question. In many instances the insurance company will provide you with a defense (e.g., pay for an attorney) even if it says it may not pay on an ultimate judgment against you. Untimely or improper notice can result in an argument by the insurer that the loss need not be covered, so you should verify the proper means for reporting the claim and do so promptly. Your policy should contain specific instructions about how and where to forward notice of a claim.
- **Consider whether you have claims against third-parties**. Sometimes the party commencing litigation doesn't have a relationship with the party who committed the actual negligent or wrongful act that harmed them, or doesn't know who that party is because this party worked for or through you. You should determine if there are any such parties right away because you may have limited time to notify them of the problem or to sue them.
- **Call Thomsen Nybeck**, and let us worry about it. Whether you have started the above steps or still don't know where to begin, give one of our litigation attorneys a call and let us start developing a strategy that works for you.